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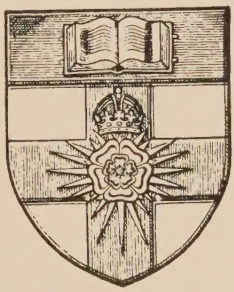

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THE

LAW REPORTS.

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTCH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

REPORTED BY

CHARLES CLARK, Queen's Counsel;

JOHN FRASER MACQUEEN, Queen's Counsel;

HERBERT COWELL, Barrister-at-Law.

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[HOUSE OF LORDS.]

JAMES THOMSON BRISTOW AND J. G. LIVINGSTONE . . . . . } APPELLANTS;

AND

ROBERT CORMICAN AND C. NELSON . RESPONDENTS.

H. L. (I.) 1878 Jan. 24, 29, 31; March 28.

Several Fishery—Inland non-tidal Lake—Public Right of Fishing—Evidence—Question for Jury.

The Crown has no *de jure* right to the soil or fisheries of an inland non-tidal lake.

If there are acts *in pais*, which would be admissible as evidence of the title of the Crown, they must be submitted to a jury. They cannot be taken by the Judge and made the basis of a decision by himself alone.

A general grant by the Crown of a several fishery in a non-tidal lake is not, without more, sufficient to establish the title thereto; and, where there is no evidence of acts of possession by the grantee at the particular part of the lake which is the place in dispute, can have no effect.

A claim was made for a several fishery extending over the whole of *Lough Neagh*, a large non-tidal lake in *Ireland*, including therein a place called *F.*, where the Defendants were charged with having unlawfully trespassed on the Plaintiffs' several fishery. The claim was founded on a grant by *Charles* II., dated in 1660, and upon certain leases since made by persons claiming title under that grant, and payments of rent under grant and leases were shewn. No evidence was given of the title of the Crown to the soil or fishings of the lake, the limits of the fishery, as described in the grant, did not appear to include the whole of the lake, and, as to the place, *F.*, which was the subject of dispute, there was no mention of it in the grant, nor was there evidence that the grantee, or those who claimed under him, had enjoyed exclusive possession of the place. Evidence of convictions for trespassing on the lake was given, but that evidence did not apply to *F.* The Defendants set up a claim of right on the part of the public to fish at *F.*, and produced evidence of user in support of their claim. The Judge at the trial did not leave the case as a question of fact for the jury, but took upon himself, upon the Plaintiffs' evidence, to direct the jury to find a verdict for the Plaintiffs:—

Held, that the case was, (with proper directions from the Judge on points of law,) one of fact for the decision of the jury, and the order of the Court below, which had directed a new trial, was affirmed (1).

Observations as to the evidence, given on the one side and on the other, in this case.

Per LORD BLACKBURN:—Recitals in documents are no evidence of what is

(1) The questions—whether any right can exist in the public to fish in the waters of an inland non-tidal lake, and, whether the right to fish in its waters

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there recited, though actual possession, in conformity therewith, would constitute a *primâ facie* title.

Per LORD BLACKBURN:—There is no authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. The *dictum* on this point of Mr. Justice *Wightman* in *Marshall* v. *The Ulleswater Steam Navigation Company* (1) not approved.

THE Appellants (Plaintiffs below) were the trustees of *S. Delacherois Crommelin*, and brought trespass against the Respondents to assert a right to a several fishery in *Lough Neagh*. The plaint contained three counts: 1. Trespass on the Plaintiff's several fishery in *Lough Neagh* at a place called *Feumore;* 2. Trespass on the Plaintiffs' land covered with water at *Feumore* being part of *Lough Neagh;* 3. Conversion of the Plaintiffs' fish.

The Defendants pleaded a denial of the alleged trespasses; a denial of the Plaintiffs' property in the several fishery, lands, and goods; a denial that there was a several fishery in *Lough Neagh;* and, as a special defence to the first two counts, they alleged that the several fishery and the lands covered with water were, and from time immemorial had been, part of an inland sea called *Lough Neagh*, and at the time when, &c., the said inland sea had been a common or public navigable inland sea, and that, in the part thereof mentioned, every subject of the realm had, and of right ought to have, the right and privilege of fishing, and that in the exercise of that right the Defendants committed the trespasses in the said counts mentioned.

The Plaintiffs by their replication took issue on the allegations of fact, and also averred that the tides of the sea had never flowed in *Lough Neagh*, and that the fishery in the first count mentioned, and that the place in the second count mentioned, had been put in defence, and was an ancient possession of the Crown, and had been granted by the Crown to the Earl of *Donegall*, through whom the Plaintiffs claimed.

The Defendants demurred to this replication and joined issue on the other pleadings. The demurrer was overruled.

The following were the issues framed for the trial:—1. Whether

may not be the exclusive property of private individuals, so as to prevent any claim by prescription as to a fishery in gross, were discussed, but the judgment did not apply to them.

(1) 3 B. & S. at p. 742.

the Defendants did the acts in the first count mentioned, or any of them? 2. Whether the fishery in the first count mentioned was the several fishery of the Plaintiffs? 3. Whether there was a several fishery in *Lough Neagh* as alleged in the first count? 4. Whether the Defendants did the acts in the second count mentioned, or any of them? 5. Whether the lands in the second count mentioned were the lands of the Plaintiff? 6. Whether the Defendants converted the goods in the third count mentioned? 7. Whether the goods in the third count mentioned, or any of them, were the goods of the Plaintiffs? 8. Whether the Defendants' special plea to the first and second counts is true in substance and in fact? 9. Whether the Plaintiffs' third replication to the Defendants' special plea is true in substance and in fact?

The cause went to trial at the Spring Assizes for the county of *Antrim*, before Mr. Justice *Lawson*, in March, 1874.

The Plaintiffs gave in evidence an attested and certified copy, from the Public Record Office, of a lease dated the 15th of November, 1660, made by King *Charles* II., whereby he demised to Sir *John Clotworthy*, "All the lough called *Lough Neagh* and *Toome*, together with the fishings and the soil thereof, and the islands in the said lough, called *Ram's Island* and *Cony Island*, containing three acres of ground, and also the lough and river of *Bann* as far as the salmon leap, containing six salmon fishings and two mixed fishings of salmon and eels, and one of eels and another of trout, which said lough borders upon the counties of *Down*, *Antrim*, and *Londonderry*, *Tyrone* and *Armagh*, in the province of *Ulster*." The lease was for ninety-nine years, as from the month of May, 1656, at a rent for the lough and soil, with the fishings for the first seven years, at £5 per annum; and for the River *Bann*, with the fishings during the same period, at £35 per annum; and for the remainder of the term £6 for the *Toome* and £44 for the *Bann* fishings. The lease recited that Sir *John Clotworthy* had represented to His Majesty that King *James* I. had granted to him a pension of 6*s.* 8*d.* a day for his life, but "being obstructed by a late unlawful power" in receiving the same, he was forced from that power to take a lease for ninety-nine years of a lake called *Lough Neagh*, and the *Bann* river in the province of *Ulster*, with the soil and fishing thereof, and the islands in the said lough called

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Ram's Island and *Cony Island*, in lieu of his said pension, and for that he had surrendered his said pension and right thereunto, and received the said lease;" all which he submitted to the King, who referred it to the Bishop of *Derry*, who recommended the grant of the lease now put in evidence.

The Defendants' counsel objected to the reception of this evidence, but the learned Judge admitted it subject to the objection.

Certified copies of the Crown rent receipt-books were also put in. They shewed the receipt from Sir *John Clotworthy* of £2 10*s.* for one half-year's rent due at Michaelmas, 1660, for *Lough Neagh*, and *Toome*, and *Rams' Island*, and *Cony Island;* and £35 for *Lough Neagh* and the river of *Bann* as far as the salmon leap. As for the two mixed fishings of salmon and eels, the book contained these entries, "Discharged by order of Court in Trinity Term, 1661."

There were then put in evidence the following documents: a copy of a grant, dated 13 *Charles* II. (1661), to *Arthur Chichester*, Earl of *Donegall*, of the fishings and fishing-places above mentioned, to hold to him and his heirs and assigns for ever; a lease of November, 1811, from the Marquis of *Donegall* to Sir *George Fitzgerald Hill* of "the salmon-trout pulling and scale fishings of *Lough Neagh* and of the River *Bann* as far as the rock or salmon leap," to hold for sixty-one years from the 1st of May, 1811, at a rent of £60; a lease, dated the 31st of March, 1829, for lives renewable for ever, from the Marquis of *Donegall* to *John Wallace;* a mortgage under that lease from *Wallace* to *Delacherois Crommelin;* a fee farm grant; a sub-lease to Earl *O'Neill* at a rent of £100; and other documents of the same kind, all founded on the same title. The payment of rent to Lord *Donegall* under the lease of 1811, and payments of rent by Lord *O'Neill*, were also proved.

Evidence was also given of persons having fished in *Lough Neagh*, and having paid rents to Lord *O'Neill* for liberty to do so. There was evidence of warnings given to trespassers, and of convictions, on behalf of his Lordship, against such persons, at the petty sessions in 1862 and 1868. The parol evidence of actual possession by those claiming under the patent of *Charles* II. was contained chiefly in the evidence of two witnesses, *Robert Magell*

and *John Lilly*. The former proved the payment of rent to Lord *O'Neill* for liberty to fish in *Lough Neagh*. He said: "The part of the fishing I held was from *Loughamore* to *Donore*, might be six miles in length, and three in breadth." This was said to describe a part of the shore between *Antrim* and *Toome*. *Lilly*, who had been Lord *O'Neill's* gamekeeper, and had watched the place and warned off trespassers, gave evidence which referred to the same locality. *Feumore* was said to be some miles distant from the spot described in this evidence. There was no direct evidence of possession by the Plaintiff or acts of possession exercised in *Feumore*, where the right set up by the Defendants was claimed to exist. There was also put in evidence a judgment of the Court of Exchequer in *Ireland* in 1873, at the suit of the Plaintiffs in this cause, against two fishermen named *Caldwell* for tresspass on the Plaintiff's several fishery in *Lough Neagh* at *Feumore*. This judgment had been allowed to go by default.

The Defendant's counsel, Mr. *McMahon*, claimed a nonsuit on the ground that there was no evidence sufficient to sustain the claim of the Plaintiffs for a several fishery with regard to the place, *Feumore*, at which the Defendants had fished; that the grants and leases were not conclusive, and that there was no proof of user by the Plaintiffs or their predecessors as to that part of the lake; and he contended that there was nothing to shew the existence of a several fishery there, but that that part of the *Lough Neagh* was a navigable lake, in which the public had a right to fish, and had been accustomed to fish. Evidence was produced in support of the fact last alleged. The Defendant's counsel asked the learned Judge to leave to the jury, first, whether there was any several fishery in *Lough Neagh*, except as to the part let to Lord *O'Neill*; secondly, whether there was any several fishery on the part of the lough where the Defendants had fished; thirdly, whether the Defendants' special plea was true in substance and in fact; fourthly, whether the Plaintiff's last replication was true in substance and in fact; and also, fifthly, they required the learned Judge to direct a verdict for the Defendants on the several issues; sixthly, that there was no evidence to support the Plaintiff's claim; and, seventhly, that there was no evidence of enjoyment of a several and exclusive right of fishery in the part of the lough

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in which the Defendants had fished, either by the Plaintiffs or by any of their predecessors in title.

The learned Judge declined to comply with these requisitions, but left the first, sixth, and seventh issues to the jury. The findings on these issues were for the Plaintiffs; but his Lordship reported that, "From what the jurors stated I have no doubt they would have found for the Defendants on the other issues if such issues had been left to them, for they stated that they thought the men had a right to fish, and that it was not the several fishing of the Plaintiffs. I was of opinion that the Defendants' special plea was not proved, as the lake was an inland non-tidal lake. I directed a verdict for the Plaintiffs, reserving liberty for the Defendants to move to have the verdict entered for them if I should have complied with any of Mr. *McMahon's* requisitions."

The Court above was to be at liberty to draw inferences of fact.

A conditional order to enter the verdict for the Defendants or for a new trial was obtained on the grounds of the reception of illegal evidence and of misdirection; and this conditional order was made absolute on the 8th of June, 1874 (1). Upon appeal to the Exchequer Chamber the Judges of that Court were equally divided, and so the decision of the Court below stood affirmed (2).

This appeal was then brought.

Mr. *Benjamin*, Q.C., and Mr. *W. Andrews*, Q.C., of the Irish Bar (Mr. *Bruce*, also of the Irish Bar, was with them), for the Appellants:—

The right to the several fishery in the whole of the lake was clearly established. The documentary evidence proved that, for the terms of the grant were general, so as to include every part of the lake. The documentary evidence was confirmed by payments of rent. There was really nothing on which the jury had to exercise a judgment. There was no doubt of the authenticity of the grant, nor of the leases, nor of the receipts of rent by the Crown in the first instance, and by others in recent years. The whole case was therefore made out, and the Judge did rightly in taking on himself the decision of it, for there was no disputed matter of fact for him to leave for the consideration of the jury. There

(1) 10 Ir. Rep. (Com. Law) 398. (2) 10 Ir. Rep. (Com. Law) 412.

was no dispute about the possession, by the Plaintiff, of most parts of the lake, and that must be coupled with the words of the grant, which in the most general terms conveyed a right to the whole. The undoubted possession of those parts constituted a legal possession of the whole.

This lake is not an arm of the sea where the tide flows and reflows, and where, therefore, a several fishery may not be created, but is a still water lake, where the Crown might have the right to the soil and might grant the right to fish in the water which covered it. There cannot be an opposite claim of a general right in the public to a fishery there, or even in a certain portion of the public to do so, without some distinct proof of the legal origin of such a right. No proof of that sort existed here. The king's grant, the deeds which had subsequently been made, and the payment of rent according to their provisions, shewed acts of possession which could not be disputed. They were all acts of user, which left no doubt as to the existence of the right, of its exercise, and of the general acknowledgment of it. Acts by different members of the public, occurring at uncertain times and places, and without a shadow of original authority, could not be set up against such evidence, as establishing a right in the public at large. There could be here no such right in the public as a right in gross, and no special exceptive right in any particular portion of the public was established here. The Judge, seeing that there was nothing but a claim to fish on a particular part, made by certain individuals, not in virtue of any special title, but merely on account of an occasional practice, which, after all, was a mere practice of committing a trespass, and seeing that that claim was opposed to a royal grant made two centuries and a half ago, acquiesced in ever since, proved by repeated leases and payments of rents, took upon himself to say that the Plaintiff's title was established, and it was distinctly stated by Mr. Justice *Wightman*, in *Marshall* v. *The Ulleswater Company* (1), when speaking of lakes and of the rights of the Crown: "That the soil of land covered with water, may, together with the water and the right of fishing therein, be specially appropriated to a third person, whether he have land or not on the borders thereof or adjacent thereto," so that the grant itself constituted a valid title, and no title had

(1) 3 B. & S. 732, at p. 742.

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been shewn on the other side. The jurors, therefore, could not have been asked to find a right existing in mere trespassers, solely because they had been frequent trespassers. Even in a case where evidence was produced to shew that various persons had been accustomed to fish for above sixty years in a non-tidal river, they not being able to shew any original legal title to do so, it was held that this long user gave them no right in law, and an information against them for unlawful trespassing was sustained: *Hudson* v. *MacRae* (1); and *Shuttleworth* v. *Le Fleming* (2), had established that user of that kind for above sixty years could not be pleaded under the Prescription Act, for it was in truth a claim of a right in gross, which was not within the statute of 2 & 3 Wm. 4, c. 71. In *Hargreaves* v. *Diddams* (3), it was declared that such a right could not exist in law, and the previous case of *Hudson* v. *MacRae* (1) was there expressly referred to and adopted, and a case of *Reg.* v. *Burrow* (4), which had appeared to lay down a different doctrine, was distinguished. So that in reality there could be no foundation in law for such a claim as that which was now set up by these Respondents. That being so, it was of no use to leave to the jury the consideration of facts which, even if believed to be substantiated by proof, could have no effect in law, and the learned Judge therefore did rightly in taking upon himself to direct that judgment should be entered for the Plaintiffs.

Possession had been shewn here, and possession was conclusive against a trespasser: *Graham* v. *Peat* (5); *Catteris* v. *Cowper* (6); *Nelson* v. *Cherrill* (7); *Whittington* v. *Boxall* (8). The mere absence of evidence as to acts of possession at a particular spot on the lake, could not affect the right of the Appellants, who held under a royal grant of the whole, and who and whose predecessors had repeatedly exercised acts of possession over all the other parts.

Mr. *McMahon*, Q.C., and Mr. *Frazer* (both of the Irish Bar), Mr. *J. D. Fitzgerald* was with them, for the Respondents:—

There is no principle of law, nor any decision of a Court, declaring, in a case like the present, that possession of a part of an estate

(1) 4 B. & S. 585.
(2) 19 C. B. 687; 34 L. J. (C.P.) 309.
(3) Law Rep. 10 Q. B. 582.
(4) Q. B. May 29, 1869; 34 Just. of the Peace, 53.
(5) 1 East, 244.
(6) 4 Taunt. 547.
(7) 8 Bing. 316.
(8) 5 Q. B. 139.

is proof of a title to the possession of the whole. The evidence of possession of part may be admissible, but it is capable of being met by opposing evidence, and is the subject of consideration for the jury. The grant here affected a non-tidal inland lake, over which the Crown has not, by virtue of mere prerogative, an absolute right of dominion, with a power to grant it to any selected individual. The title of the Crown must itself be first established. Even if that was not so, the grant here did not purport to convey the whole, for its phraseology was peculiar, and the parts mentioned in it did not describe the whole of the lake, and whatever might be the value of subsequent leases, and of payments of rent under them, they could not be made to apply except to the individual specific parts of *Lough Neagh* as to which those leases had been made, and as to which the tenancies were admitted and the rents paid. The question, therefore, raised in this case was one which was properly the subject of evidence, and consequently the subject for decision by a jury. It depended not merely on the terms of a grant, nor on the execution of leases or payments of rents under them, but on evidence of possession of the place which was the subject of dispute, a possession to be proved or disproved by uncontested acts of individual ownership on the one side, or of public user on the other. In *Reed* v. *Jackson*, which was a case of a public right of way, Lord *Kenyon* said (1): "Reputation was evidence with respect to public rights," but he added, "not with respect to private rights," so that evidence of user could be relied on here by the Defendants, while evidence of title, and of actual possession under it, was required on the part of the Plaintiffs. That rule was applied in *Weeks* v. *Sparkes* (2), because the interests of a great many persons, not actually parties to the individual suit, were there considered on the claim of a general right on one spot; but where that was not the case, even an award in favour of a particular person, though he was the tenant of the party there suing, was held not to be admissible in evidence: *Wenman* v. *Mackenzie* (3). It certainly could not be conclusive against any one. The payments of rents in ancient times might be admissible to prove the fact of such payments: *Rogers* v. *Allen* (4); but they did not prove the title in

(1) 1 East, at p. 357.
(2) 1 M. & S. 679.
(3) 5 El. & Bl. 447.
(4) 1 Camp. 309.

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respect of which such payments were made, without evidence of another kind being first presented: *Tyrrwhitt* v. *Wynne* (1). And in *Malcolmson* v. *O'Dea* (2), where evidence of ancient payments was admitted, there had first been given proof of the existence of title under which they were claimed and were made. And *Roll* v. *Osborn* (3) distinctly shewed that there must be a possession in conformity with the grant in order to establish a valid title: *Chad* v. *Tilsed* (4); *Waterpark* v. *Fennell* (5); and, in trespass, under the plea that the close is not the close of the Plaintiff, the Defendant may not only contest the right of the Plaintiff to the possession, but may shew a lawful right to it in himself: *Jones* v. *Chapman* (6). The want of evidence of possession was fatal to the claim set up by a grantee of the Crown in *Parmeter* v. *The Attorney-General* (7).

The case here depended on the question whether there was sufficient evidence to support the claim, and that was a question for the jury, from whose consideration it had improperly been withdrawn.

Mr. *Benjamin* replied.

1878 *March* 28.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case the Appellants, as the trustees of *Samuel Delacherois Crommelin*, brought an action in the Court of Exchequer in *Ireland* against the Respondents. The action was for trespass to a several fishery in *Lough Neagh*, in the North of *Ireland*, at a place in the lough called *Feumore*, and it was brought for the purpose of establishing a right to a several fishery in the whole of the lough. The title of the Plaintiffs to this fishery was denied upon the pleadings, and by the issues; and upon the issues thus raised Mr. Justice *Lawson*, at the trial, directed a verdict to be entered for the Plaintiffs, withdrawing in effect the case from the jury. The Court of Exchequer in *Ireland* set aside this verdict and ordered a new trial on the ground of misdirection, and on the appeal to the Exchequer Chamber this order of the Court of Exchequer was confirmed.

(1) 2 B. & Ald. 554.
(2) 10 H. L. C. 593.
(3) Hob. at p. 22.
(4) 2 B. & B. 403.
(5) 7 H. L. Cas. 650.
(6) 2 Ex. 803.
(7) 1 Dow. 316.

The question for your Lordships' consideration is, was the course taken by the learned Judge at the trial the right one, or was it not? In other words, was the learned Judge, upon the documentary and other evidence before him, right in treating the title of the Appellants to the fishery as a question of law to be withdrawn from the jury, and to be decided by the Court upon the construction of the documents before it; or did the title of the Appellants depend, to a greater or less extent, upon the proper view to be taken of questions of fact, which facts ought therefore to have been left to the jury?

My Lords, I wish to make it clear at the outset that this appears to me to be the only question for your decision in the case; because some part of the argument at the Bar was devoted to other matters upon which, as it seems to me, no determination can be arrived at by your Lordships. The Defendants in the action, the Respondents, had pleaded a special defence alleging that *Lough Neagh* was a public or common navigable inland sea, and that every subject of the realm had a right of fishing in it, and justifying their trespass under this right. To this special defence there was a replication averring that the tides of the sea had never flowed in *Lough Neagh*, and to this replication there was a demurrer, which demurrer was over-ruled. Against the order over-ruling this demurrer the Respondents have not appealed, and the Appellants remain therefore the victors on that issue. My Lords, I mention this in order to shew that it does not appear to me that your Lordships can in this case decide whether the replication to which I have referred was, or was not, a valid defence in law. That may be a fit question to raise in some other case; but it cannot, for the reasons I have mentioned, be raised in this case.

It becomes necessary now, in order to judge of the course taken by Mr. Justice *Lawson* at the trial, to consider the evidence which the Appellants had of their right of fishing in *Lough Neagh*.

Actual, physical, or mechanical possession of a fishery at *Feumore* they had not, and, so far as the evidence went, they never had. If they had had possession of this kind, for however short a period, it would, as against a trespasser, have been sufficient; but they had none. They therefore proceeded upon their documentary or paper title.

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Now a documentary title commencing with some person rightfully in possession, or who has an admitted or proved right to be in possession, and connecting itself with a Plaintiff in an action of trespass, would, generally speaking, and in the absence of any title in the Defendant by adverse possession, be sufficient to maintain an action of trespass. I proceed, therefore, to state how the documentary title stands. It begins with the Crown. On the 15th of November, 1660, *Charles* II. granted to Sir *John Clotworthy*, afterwards Viscount *Massareene*, all the fishings of *Lough Neagh*, and the fishings of the *River Bann*, for ninety-nine years from the 13th of May, 1656 (a lease, therefore, which would expire in 1755), on payment of a rent of £5 for the lough fishings and £35 for the *Bann* fishings for the first seven years, and £6 for the lough fishings and £44 for the *Bann* fishings for the remainder of the term.

On the 3rd of July, 1661, there is a patent grant of *Charles* II. of all the fishings of the lough and *River Bann* (that is, of the reversion, subject to the lease to Sir *John Clotworthy*) to the Earl of *Donegall* in fee. On the 31st of March, 1829, there is a lease for lives renewable for ever, from the then Marquis of *Donegall*, of fisheries in *Lough Neagh*, which I will for the present assume to be co-extensive with the fisheries in the patent of 1661. This lease is made to *John Wallace*, who is admitted to be a trustee for the late *Nicholas Delacherois Crommelin*. Lastly, on the 28th of January, 1857, this lease for lives renewable for ever is turned by the present Marquis of *Donegall*, under a statutory power, into a fee-farm grant, in favour of the same *Nicholas Delacherois Crommelin*, whom the Appellants represent.

I assume, therefore, if King *Charles* II., or his tenant in his right, was, in 1660, entitled to a several fishery in the whole of *Lough Neagh*, the documents which I have referred to would carry on that title to and place it in the present Appellants, no adverse title being shewn. But was it really admitted or proved that in 1660 King *Charles* II. or his tenant was thus entitled? Certainly it was not admitted; and the question must be, was it proved, and in what way was it, or could it be, proved? The Crown has no *de jure* right to soil or fisheries of a lough like *Lough Neagh*. *Lough Neagh* is, as your Lordships are aware, the longest inland lake in the *United Kingdom*, and one of the largest in *Europe*. It

is from fourteen to sixteen miles long, and from six to eight miles broad. It contains nearly 100,000 acres; but though it is so large, I am not aware of any rule which would, *primâ facie*, connect the soil or fishings with the Crown, or disconnect them from the private ownership either of riparian proprietors or other persons. *Charles* II., or some of his predecessors, may have become possessed of the lough and its fishings, either by grant or forfeiture, or otherwise; but it would be a legitimate and necessary subject of inquiry how and from whom, and subject to what conditions or qualifications, this possession or proprietorship was obtained.

There being then no direct evidence of the proprietorship of the Crown beyond the statement of that proprietorship in its own deeds, the question arises, what evidence is there of acts done, acts as it were *in pais*, either before or at any time since 1660, which would be admissible as evidence of the title of the Crown at that date?

It appears to me to be obvious that if there are any such acts they must be submitted to the jury. They cannot be taken by the Judge, and made the basis of a decision by him, without usurping the functions of the jury.

Old leases have always been considered to be admissible as being evidence of acts of ownership. I understand this to rest on the principle, that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself responsible as lessor for the title to it, and another person willing to agree to give rent for the property and to enter into a solemn engagement as a tenant of it, admitting his landlord's title, these circumstances are of themselves admissible as evidence of the title. They are real transactions between man and man, not intelligible except on the footing of title, or at least an honest belief in title. The payment of rent under such a lease is a farther and additional fact also admissible as evidence on the same principle.

There is no doubt that on this principle the lease to which I have already referred, of the 15th of November, 1660, from *Charles* II. to Sir *John Clotworthy*, and the payment of rent under it, would be evidence to go to a jury of seisin and ownership by the Crown at that time. There are, however, observations to be made, and which a jury might consider to be of greater or less weight,

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with regard to this lease and the payment of rent. The lease states that Sir *John Clotworthy* had a pension granted him by King *James* I. of 6*s.* 8*d.* per day for his life, but that being obstructed by "a late unlawful power" (obviously meaning the Protector) in receiving the same, he was forced from that power to take a lease for ninety-nine years of *Lough Neagh*, with the soil and fishings, and that he had surrendered his pension and received the lease. There is not here, therefore, the case of a tenant examining his landlord's title, and professing himself satisfied with it, and agreeing to take a lease on this footing, but rather the case of a person violently ousted of something he was entitled to, and being forced to take a lease of something else which apparently he did not want or ask for, and the validity of the title to which he had little opportunity to scrutinize.

Again, with regard to the payment of rent there is evidence of a payment made in 1660, or, it may be thought, of one payment immediately before, and one immediately after, the date of the lease of the 15th of November, 1660. But although the lease would run on until 1755, and the rent would continue to be payable to the Earl of *Donegall* by Sir *James Clotworthy*, no evidence is produced that any rent was subsequently paid. From 1660 to 1811 there is a complete blank as regards anything that would be evidence of ownership or seizin in 1660. In 1811 there is a lease by the then Marquis of *Donegall* to Sir *George Hill* of fishings in *Lough Neagh*, for 61 years, expiring in 1872, at a rent of £60. But the extent of the fishings included in this lease does not appear to me to be necessarily co-extensive with the whole of the lake. On the contrary, the lease appears on the face of it to raise a question as to the extent of the fishings intended to be demised which could be solved only by parol evidence. The description of the fishings demised is this, "All that and those the salmon, trout, pulling, and scale fishings of *Lough Neagh* . . . in as full, ample, and extensive a manner as the same have heretofore been enjoyed by the Marquis of *Donegall*, and those under whom he has derived, with liberty of taking and carrying away, and exporting of such fish . . . and also all profits, benefits, and advantages whatsoever to the said fishery belonging, with full power of going to the banks of the said lough and river, and every part thereof within

the aforesaid limits . . . for the purpose of catching and taking salmon and other fish, except eels, within the known and accustomed limits of said fisheries, as late in the tenure of the Rev. *Edward May*, by virtue of an indenture of lease dated the 1st day of October, 1803" . . . which lease had come by assignment to Sir *George Hill*, and had been surrendered.

It is impossible not to see that this lease is not meant to be a demise without qualification of the fisheries of the whole lake, and that parol evidence of the "known and accustomed" limits of the fisheries as then lately held by the Rev. *Edward May*, might have been introduced and might have been material.

No evidence was given of any possession had under this lease of 1811 prior to 1837. In 1837, *Duckett* and *Henderson*, in whom was vested the term then unexpired of Sir *George Hill's* lease, granted an under lease to the Earl *O'Neill* at a rent of £100, but this sub-lease professed on the face of it to demise the fishings of *Lough Neagh* within the limits only of the lease of 1811, and of course could not have affected the fishings beyond those limits; and even within those limits it provided that the demise was not to be taken as a warranty on the part of *Duckett* and *Henderson* of the title of Lord *Donegall* to demise the fishings.

There is no evidence of anything done under this sub-lease at *Feumore*. There is evidence of fishing by persons claiming under Lord *O'Neill*, near *Shanes Castle*, at another part of the lake, and there is evidence from Mr. *Torrens*, agent and solicitor for Lord *Donegall*, that the rent reserved by the lease of 1811 was paid to him since 1845 for the present Marquis of *Donegall*. The payment of this rent to Lord *Donegall*, however, is itself not consistent with the documentary title. Lord *Donegall* in 1829 had granted a lease for lives, renewable for ever to *John Wallace*, and from that time the rent under the lease of 1811, *primâ facie* should have been paid to *John Wallace* and those claiming under him.

My Lords, I have I think said enough to shew that it was on the one hand incumbent on the Appellants, in order to make available their documentary title, to give some evidence of the ownership or possession of the Crown at the beginning of that title; and that on the other hand, although they have produced the evidence to which I have referred of this ownership, this evi-

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dence was, from its very nature, evidence to be submitted by the Judge to the jury, with proper observations and explanations, and was evidence the effect of which it was for the jury to determine.

My Lords, I am anxious to abstain carefully from expressing any opinion of my own as to the effect of this evidence. It may be that on a farther trial, farther or other evidence may be produced, and the decision may have to be taken upon materials different from those now before your Lordships. Enough appears on these papers to shew that the question raised in the case is one which excites considerable interest and some feeling, and perhaps bias, in the neighbourhood where it arises. Although, as I think, the opinion of the jury must be taken on the evidence which is to establish ownership, this opinion must be taken under a careful instruction and direction from the presiding Judge, and subject to review by the Court, if, in the opinion of the Judges, the evidence does not fairly support the finding.

I have only now to move your Lordships that the order of the Court below be affirmed, and the present appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, having had the opportunity of seeing the opinion of my noble and learned friend on the woolsack, which has just been delivered to the House, and having carefully considered it. I have come, without hesitation, to the same conclusion, after hearing the arguments that have been adduced at your Lordships' Bar in respect of this appeal.

The case really appears to be reduced to one point, which is not always a point easy of solution—at the same time, in the present instance, I think it is placed beyond controversy by the observations which have been already made. That one single point to which the case seems to be reduced is, whether or not the documentary evidence put in in the case, and especially the early charters or the early demise on the part of the Crown, amount in point of law to so clear and distinct an evidence of possession on the part of the Appellants in this case, or rather of those under whom they claim, as to justify the Court in directing the jurymen that they are to find for the Plaintiffs in respect of that possession.

There can be no doubt whatever that mere possession is sufficient, against a person invading that possession without himself having any title whatever,—as a mere stranger; that is to say, it is sufficient as against a wrongdoer. The slightest amount of possession would be sufficient to entitle the person who is so in possession, or claims under those who have been or are in such possession, to recover as against a mere trespasser. It has been decided undoubtedly, with respect to old leases in particular, especially where rent has been paid under them, that those leases do amount to a clear and distinct evidence of possession, for the reasons which have been already assigned.

But, my Lords, the present case is certainly of a very peculiar character, and by no means admits of any such easy demonstration. In the first place, as to actual possession, there appears to be, at the particular spot where the controversy is raised, no actual possession either asserted or claimed; but it is said that an entry was made upon a portion of the property; the entry which seems principally to have been relied upon, is the entry of Lord *O'Neill* on part of that property which is included in the demise; and it is said that that entry is to be taken as being upon the whole property demised, and that the extent of the possession so taken must be measured by the extent of the conveyance which has been placed in evidence before the Court. But, as it has already been pointed out, there are great peculiarities in the case, and when I have noticed one or two points in connection with them, I shall conclude all I have to say; for I think that the case has been exhausted by what your Lordships have already heard.

It is a very remarkable thing, not only that this grant is made, under singular circumstances, to Sir *John Clotworthy* who was afterwards Lord *Massereene;* but it is plain even upon the face of it that he was accepting what he could get for that which he had been deprived of. It appears that he had surrendered his pension of 6*s.* 8*d.* a day, which, although not a considerable sum now, was, at that time, a considerable sum amounting to more than £120 a year; and that by this "power" of which he speaks, that is to say, the act of *Cromwell*, he had been deprived of it, and compelled to accept in lieu of it, apparently unwillingly, this grant which had been made by *Cromwell.* Having accepted that, when the

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Restoration took place, he enters into an arrangement with the Crown, and confirms the surrender of his pension and accepts in lieu of it this special grant. But what strikes me throughout the whole case is this, that there is, in this paper title which has been set up, a great meagreness with respect to several documents which are referred to, but none of which is produced, and for the non-production of which no cause is assigned.

For instance, I will refer to this very document I have been speaking of, of the 15th of November, 1660, executed immediately after the Restoration, which took place in May, 1660. In that document a reference is made to the title being vested in His Majesty King *Charles* II. by means of a surrender which had been executed upon the 1st of July, in the 16th year of the reign of the late King *Charles* of blessed memory by Lord *Chichester*. Now, it is curious that that being represented to be a surrender made by Lord *Chichester* to King *Charles* I., by means of which the title of *Charles* II. is introduced, and the deed being specified by the day of the month and the year, namely, the 1st day of July in the 16th of *Charles* I., when you find an instrument of surrender, referred to in the grant to Lord *Donegall* which is the next document [this and the next document were referred to in the Appendix to the printed case prepared by the Appellants]—a grant made not quite a year after the indenture of demise to Sir *John Clotworthy*, conveying the reversion to Lord *Donegall*, you find it is referred to in this way—the mode in which His Majesty is supposed to be entitled to it is by virtue of a surrender made on the 24th of September, in the 14th year of his reign, by *Edward*, Viscount *Chichester*, and his son *Arthur*, the now Earl of *Donegall*. Now, that is obviously another instrument and that instrument is not produced, we know nothing about it.

It is of very great importance in this case to have all the circumstances of the case before us, and to see how it was that the property became vested in the Crown, of which we have no history at all. Clearly no one has a right to say that it became vested in the Crown because it belonged to nobody else. This is an inland lake, and therefore it is not a portion of land belonging to the Crown by reason of its being on the shore of the sea, or a navigable strait or river. It being very important to see how it became

vested in the Crown, there is a curious discrepancy between the two recitals, the one founding the title of the Crown upon a surrender made by Lord *Chichester* on a certain day of a certain year, and the other founding it upon a surrender made by Lord *Chichester* and his son on a certain other day of a certain other year. That ought to be explained.

And when you come to the lease to Sir *George Hill*, you find that it is founded upon a grant which had already been made to the Rev. *Edward May* by a demise of 1803, and the grant is to hold in the same manner, and to the same extent, in fact, as *May* had held. That made it particularly important that we should see the lease to *May*. That lease to *May*, or the counterpart of it, must be amongst the archives of the *Donegall* family, by whom this lease was made; but that document has not been produced.

My Lords, that being the state of things, it appears to me that it is quite impossible to say that this lease stands in the position of a separate demise, found to have been made at some distant and remote period, as to which no other evidence is accessible, and supported by the payment of rent under that demise. Even as regards the subject of the payment of rent, it has been already observed that the payment of rent proved in evidence seems to be inconsistent with the paper title set up upon the records, because that paper title upon the record would make the rent payable to *Hill* at a time when it appears in evidence to have been payable to the agent of Lord *Donegall*. Therefore the case seems to be beset with difficulties in many ways, from a lack of sufficient information. That lack of sufficient information is just a matter for the finding of a jury. Upon a new trial taking place, if there should be one, it is possible that other and complete evidence may be produced. All we have to deal with at the present moment is the question whether the learned Judge was right or not in the direction which he gave to the jury. The Court below has found that he was not right, and has decided that there ought to be a new trial, and in that view of the case I entirely concur.

LORD BLACKBURN:—

My Lords, this is an appeal by the Plaintiffs below against an order of the Court of Exchequer Chamber in *Ireland*, affirming,

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with costs, an order of the Court of Exchequer in *Ireland*, whereby a verdict entered for the Plaintiffs at the Spring Assizes for the county of *Antrim*, 1874, before Mr. Justice *Lawson*, was set aside and a new trial ordered on the ground of misdirection. The Court of Exchequer had also given judgment in favour of the Plaintiffs on a demurrer to one of the replications to a special defence pleaded by the Defendants. But there has been no error or appeal brought on this judgment, which is not before your Lordships. I mention this because I see that some of the Judges below seem to expect this House to give judgment on that demurrer.

The only question brought before this House is whether the learned Judge who tried the cause was, as a matter of law, justified in directing the jury to find a verdict for the Plaintiffs. If there was any question of fact on which the opinion of the jury ought to have been taken, the Defendants are entitled to a new trial, as the jury might have found it for them. Indeed it appears from the report of the learned Judge that the jurymen intimated that, if the question was left for them, they were prepared to find a verdict for the Defendants.

My Lords, I have come to the conclusion that the order appealed against was right, and I shall now proceed to say why I think so.

The matter in controversy at the trial was whether the Plaintiffs had made out such a possessory title to the fishing in that part of *Lough Neagh* which lies near *Feumore* as would entitle them to sue the Defendants as trespassers for fishing there. Actual possession in the *locus in quo* would have been not merely evidence of title, but actually a title against wrongdoers. But there was no evidence at all that the Plaintiffs, or any one under whom they claimed, had been in actual possession of this part of the lough or of the fishings there, at any period subsequent to 1661. There was evidence that the lessees of the Marquis of *Donegall* had, within living memory, by a sub-tenant, been in possession of the fishery in a part of the lough, many miles from the *locus in quo*, and that this possession was under a lease, on the terms of which I will afterwards make a remark. At present I assume that it purported to give those lessees and that sub-tenant a right to the fishing in the whole lough; and such possession of part was, I think,

admissible as evidence to shew that they were possessed of the whole. I will afterwards give my reasons for thinking it some evidence of this, and also no more than evidence proper to be left to the jury, but not warranting a direction to find that they were possessed. The Plaintiffs shewed a title from the Marquis, which on the expiration of the former leases in 1872 became one in possession; and the Plaintiffs then entered on the fishing in the lough, as far as such a thing can be entered upon, claiming possession of the fishing in the whole lough.

It was argued at your Lordships' Bar that an entry claiming title gives possession (what is commonly called constructive possession) as against those who shew no title. I think it does if the person entering shews title, that is a right of possession, in himself or those under whom he claims. But I cannot agree that the possession which such an entry gives is like actual possession, itself a title, even against a wrongdoer. What I take to be the law on this subject is very well illustrated by the proceedings in ejectment, which were once real, though latterly they became a fiction. A lease was made by the person wishing to recover the land. At first it was a real lease to a real person. The lessee entered on part of the farm; and, if his lessor had title, that entry put the lessee in possession of the whole farm, and enabled him to maintain an action against any one who ousted him. Afterwards the person who sought to defend the possession was permitted to do so only on the terms that he should "confess lease, entry, and ouster, and rely only on title." After this, the lease, entry, and ouster, never took place in fact. If the argument of the Appellants was right, the effect of confessing entry would have been to put the Defendant on proving his title, but it was perfectly clear law that the Plaintiff in ejectment could only recover on the strength of his own title; shewing most clearly, to my mind, that the entry only gave possession if the party entering had title, but did not, like actual possession, give a title in itself, nor even afford evidence of a title. I do not go through the cases, but content myself with saying that, as far as I know, every case is consistent with this principle.

I take it, therefore, to be clear that the Plaintiffs in this case had to prove title in themselves, and the question was whether

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they had done so. That of course depends on the evidence actually given. On a new trial the evidence may be quite different.

My Lords, I shall now proceed to state what was the evidence given. No evidence was given on either side before 1660, the year of the Restoration. The Plaintiffs produced an indenture between King *Charles* II. and Sir *John Clotworthy*, dated the 15th of November, 1660. After a recital that Sir *John Clotworthy* had been forced by *Cromwell* to take a lease of the premises, which he admitted gave him no title, the King demised:—[His Lordship read the grant, see *ante*, p. 643.] Two certified copies of extracts from the Crown Rental for *Ireland*, 1659, and the Crown Rent Receipt Book, 1660, were put in to shew that Sir *John Clotworthy* paid in March, 1660, the rents of £5 and £35 for the year 1659. Those payments seem to have been made nearly at the time when by the indenture of the 15th of November, 1660, he had accepted from the Crown a lease of ninety-nine years as from 1656.

The entry in the Crown Rental is followed by this memorandum, "Discharged by order of the Court in Trinity Term, 1661, for the Earl of *Donegall*." The meaning of this is made clear by the next document put in evidence. The King had in Trinity Term, 1661, conveyed to the Earl of *Donegall* all the Crown's right to the reversion and to the rents then accruing due, and this explains why no farther payment of rent was made to the Crown. This is proved by letters patent bearing date the 3rd of July, 1661. There are recitals of a former grant by King *James* to Lord *Chichester*, being surrendered to King *Charles* I., which is also mentioned in the indenture of 1660. But these recitals in documents are no evidence of what is there recited though they may put the parties on the track as to where to look for evidence of their truth. There was, therefore, no evidence that there ever had been any grant by King *James* to Lord *Chichester* or any surrender to *Charles* I. But if Sir *John Clotworthy* was really put in actual possession of the soil of *Lough Neagh*, though it was by *Cromwell* who had no legal right to do so, Sir *John Clotworthy* would have a *primâ facie* right to hold it as his freehold until some one shewed a better title. And Sir *John* having accepted a lease from the King, if Sir *John* was in actual possession, such as to give a *primâ facie* title to Sir *John*, the King would have a *primâ facie* title to the reversion,

and might convey that reversion. And by these letters patent King *Charles* II. did convey "unto the said *Arthur* Earl of *Donegall*, his heirs and assigns, all the said fishings and fishing places of what kind soever in the said lough or pool of *Lough Neagh*."

If King *Charles* II. had a title to the soil of the lough, he conveyed it in fee to *Arthur* Earl of *Donegall*, subject to the lease for ninety-nine years. He professes also to grant something more, viz., the right to come on the banks of the lake with nets. No evidence is given as to anything being done between this date of Trinity Term, 1661, and the 1st of November, 1811. I do not think this absence of evidence would justify the affirmative conclusion that the lessee for ninety-nine years during that term, and the Earl of *Donegall's* heirs, after 1755, when that term had by efflux of time expired, did not do anything in exercise of the title claimed; but there is no evidence of their having done anything. And the absence of that evidence seems to me to weaken the effect of the document of 1660, and the payment of rent under it.

In 1811 *George Augustus* Marquis of *Donegall* executed a lease to Sir *George Fitzgerald Hill* for sixty-one years, from the 1st of May, 1811, not of the soil of *Lough Neagh*, but of "all the salmon, trout, pully, and scale fishings of *Lough Neagh*, and of the River *Bann* as far as the rock or salmon leap, in as full and extensive a manner as the same have heretofore been enjoyed by the said Marquis of *Donegall* and those under whom he has derived," "together with full power of going to the banks of said lough and river, and every part thereof, within the aforesaid limits, and of laying thereon nets within the known and accustomed limits of said fisheries, as late in the tenure of the Rev. *E. May*, by virtue of an indenture," &c. This last indenture is not produced.

I think the language of the indenture of 1811 is such as to afford room for an inference that the advisers of the Marquis did not think it prudent to bind him by an unlimited covenant for quiet enjoyment without words limiting it to the known and accustomed enjoyment. And this inference would tend to make the absence of evidence of what had been the known and accustomed enjoyment before 1811 more striking. I cannot think that the Judge could properly withdraw from the jury the consideration of these matters.

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In 1829 this same Marquis of *Donegall* grants to *John Wallace* a lease for three lives renewable for ever of the same fishings, and by the same description as in the lease of 1811, and subject to that lease. And in 1857 *George* Marquis of *Donegall* makes a fee farm grant to *Nicholas Crommelin*, on whom *Wallace's* interest in the lease had devolved, subject to the lease of 1811, which was then current. The Plaintiffs are the trustees of this *Nicholas Crommelin*.

My Lords, if *George Augustus*, Marquis of *Donegall*, was seised in fee of the land covered by water which forms the soil of *Lough Neagh*, he, as incident to his tenure of the land, had the fishing therein, and he could, and I think by these deeds did, sever the fishing from the soil, and grant it to those under whom the Plaintiffs claim. And the question, therefore, seems to me to be whether the Marquis of *Donegall* was in 1811 seised in fee of the soil of *Lough Neagh?*

It was at the trial assumed that the Marquis of *Donegall* in 1811, was the heir of the Earl of *Donegall* in 1661. This probably was the fact, and if it had been questioned, evidence that he was so might have been produced; and it must now, I think, be taken that the estate of the Earl of *Donegall* in 1661 (whatever it was) was vested in the Marquis in 1811.

Parol evidence was given as to enjoyment under the lease of 1811. It may be briefly stated to amount to this, that in 1837 a sub-lease was granted by the lessees to Earl *O'Neill*. *John Lilly*, who was keeper to Lord *O'Neill* in 1848, gives evidence that he watched the lake from *Antrim* to *Toome* along the demesne of Lord *O'Neill*, seized nets and kept off trespassers, certainly affording evidence that Lord *O'Neill* was in possession of that part of the lake, whilst he held the sub-lease. *Robert Magill* gives evidence which is not very clear. It may amount to evidence that fifty years before the trial, which was therefore before Lord *O'Neill's* sub-lease began, he, paying rent to somebody, perhaps the lessees under the lease of 1811, was in possession of the part of the lough from "*Loughamore* to *Donore*," "part of which adjoined Lord *Massareene's*, and extended along the shore." There is nothing to shew where *Loughamore* is. The position of *Donore* was pointed out on the Ordnance map, and it may be that the

witness was giving evidence of possession of the whole bay on the north-east end of the lake adjoining to *Antrim*. Whether he meant this, or whether, if he meant it, he was to be believed to this extent, were clearly questions for the jury, but he gave some evidence of modern acts of ownership under Lord *Donegall's* tenant.

On the Defendant's side evidence was called which shewed that the spot *Feumore*, where the Defendants fished, was many miles from that part of the lake in respect to which *Lilly* and *Magill* gave evidence of acts of ownership, and very strong evidence was given that over a very great part of this extensive lake no acts of ownership had ever been exercised by Lord *Donegall*, or any one claiming under him, during living memory; and there is some unexplained statement about a cutter which might or might not be material if it were intelligible.

On this evidence the learned Judge was asked to nonsuit. He refused, and every one of the Judges below agrees that he was right in so refusing, for there was evidence in support of the Plaintiff's claim proper to be submitted to the jury. In this I quite agree, and I believe no one of the noble and learned Lords who heard the argument doubted that this was so.

But he went much farther, for he directed the jury to find for the Plaintiffs. In the Exchequer Chamber, Mr. Justice *Lawson* gave an elaborate judgment, in which Chief Justice *Morris*, and Mr. Justice *Keogh* concurred, to the effect that on this evidence he was justified, and indeed required, to direct a verdict for the Plaintiffs.

I cannot concur in that opinion. I agree with the Court of Exchequer and the other three Judges in the Court of Appeal, that there was evidence proper to be submitted to the jury, from which they might draw the inference of fact that the Plaintiffs had title, but not more.

The first question that I shall discuss is whether it is conclusively shewn that *Charles* II. had in 1660 and 1661 title to the property he purported to demise to Sir *John Clotworthy*, and convey to Lord *Donegall:* I think he had not. The property in the soil of the sea and of estuaries and of rivers in which the tide ebbs and flows is *primâ facie* of common right vested in the

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Crown (1); but the property of dry land is not of common right in the Crown. It is clearly and uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land; and there is no case or book of authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. In *Marshal* v. *The Ulleswater Steam Navigation Company* (2), it is true that Mr. Justice *Wightman*, in delivering the judgment of the majority of the Queen's Bench, says, "Whether the soil of lakes, like that of fresh water rivers, *primâ facie* belongs to the owners of the land or of the manors on either side *ad medium filum aquæ*, or whether it belongs *primâ facie* to the King in right of his prerogative (Com. Dig. Prerogative, D. 50; *Hale, de Jure Maris*, c. 1), it is not in this case necessary to determine; for it is clear upon the authorities that the soil of land covered with water may, together with the water and the right of fishing therein, be specially appropriated to a third person, whether he have land or not on the borders thereof, or adjacent thereto." This is the only case cited, and as far as I can find the only case which exists, where there is even a suggestion that the Crown, of common right, is entitled to the soil of lakes. Neither the passage in *Comyns*, nor that in *Hale, de Jure Maris*, cited by Mr. Justice *Wightman*, gives any countenance to such a doctrine. But it does appear that that learned Judge did not think that the law as to land covered by still water was so clearly settled to be the same as the law as to land covered by running water, as to justify him in unnecessarily deciding that it was the same. More than this I think does not appear from that case. I own myself to be unable to see any reason why the law should not be the same, at least where the lake is so small, or the adjoining manor so large, that the whole lake is included in one property. Whether the rule that each adjoining proprietor, where there are several, is entitled *usque ad filum aquæ* should apply to a lake is a different question. It does not seem very convenient that each proprietor of a few acres fronting on *Lough*

(1) *See Gann* v. *The Free Fishers of Whitstable*, 11 H. L. C. 192.
(2) 3 B. & S. 742.

Neagh should have a piece of the soil of the lough many miles in length tacked on to his frontage. But no question arises in this case as to the rights of the riparian proprietors amongst themselves, for no title is made by either party through any one as riparian owner. I dare say Lord *Donegall* was one, but the Plaintiffs do not make title through him as such.

It is, however, necessary to decide whether the Crown has of common right a *primâ facie* title to the soil of a lake; I think it has not. I know of no authority for saying it has, and I see no reason why it should have it. Mr. Justice *Lawson*, in his able opinion, hints at one. "What ground," he says (1), "is there for suggesting that the title was not in the Crown? It is not shewn, or even suggested to be, in any other, and it could not be in the public." This would be a strong remark if there was any authority for saying that, by the prerogative, the Crown was entitled to all lands to which no one else can shew a title. But this is so far from being the case, that in the only instance in which no one could shew a title, I mean that of an estate granted to one for the life of another, where the grantee died leaving the *cestui que vie*, the law cast the freehold on the first occupant of the land (2). It was never thought that the Crown was entitled in such a case. Those who committed trespasses after the death of the tenant for life, and before any one occupied, did so with impunity, because there was no one entitled to complain of their acts, and it may be that those who fish in *Lough Neagh* may do so, not of right, yet with impunity, so long as the true owner of the soil either fails to prove his right, or does not choose to interfere. But that does not give any right to the Crown. The Crown might have had title in many ways, by forfeiture or escheat, or otherwise. But generally speaking, in order to make such a title in the Crown perfect, there must be office found. And here not only is there no evidence of any office found, but the indenture contains what purports to be a dispensation from the Statute of *Henry* VI., shewing that there was not any office found. I think, therefore, that Mr. Justice *Fitzgerald* is quite right when he says (3), that "we must deal with the grants of 1660 and 1661 in the same way as if the grantor was a private individual."

(1) Ir. Rep. 10 Com. Law, 418 (2) See Co. Litt. 40.
(3) Ir. Rep. 10 Com. Law, 422.

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Now, the indenture of 1660 purporting to make a lease of this property, and the payment of rent (though only for one year), so long ago as 1660, are admissible evidence to shew that there was actual possession by Sir *John Clotworthy* at that time. If the date of the indenture and the payment of rent had been a few years ago, they would not have been admissible evidence, for then it would have been possible and right to call witnesses to prove that possession was actually had. But inasmuch as, after long time, all the witnesses who could prove such possession are dead, the law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession. For in the ordinary course of things men do not make leases unless they act on them, and lessees do not, in general, pay rent unless they are in possession, so that the ancient payment of rent adds weight to the ancient indenture.

In *Clarkson* v. *Woodhouse* (1), on the trial, modern leases were rejected, because there was no evidence of enjoyment under them, but old leases were admitted (2).

Lord *Mansfield* said, and the whole Court agreed with him, "that these old leases were proper evidence to shew that at that time the lord of the manor did in fact demise the ground." His Lordship added, "that it was impossible to give evidence of enjoyment under such old leases." Lord *Mansfield* said nothing there about the weight to be given to such evidence; all that it was necessary to decide was that it was admissible.

In *Rogers* v. *Allen* (3), where some old licences were offered in evidence, "Mr. Justice *Heath* said he could not distinguish these licences from old leases, which were always received in evidence in favour of those claiming under the lessors. Nor did he think it necessary to prove payment under the licences, as they were of such an ancient date that it could not reasonably be supposed that evidence of such payments was still preserved. However, to give any weight to these licences, it must be shewn that in later times payments had been made under licences of the same kind, or that the lords of the manor had exercised other acts of ownership over

(1) 3 Doug. 189; 5 T. R. 412, n.
(2) See Taylor on Evidence, 7th Ed. p. 385, n. 5; and p. 566, n. 3.
(3) 1 Camp. 309.

the fishery which had been acquiesced in." So that he thought the weight of such evidence depended on extraneous circumstances. He, it is true, was speaking of documents where, if they were acted on, payment would have been made, and not of them as proving actual payments. But I am unable to see any difference in kind between the inference to be drawn from an ancient document and an ancient payment of rent. In *Malcolmson* v. *O'Dea* (1) the question arose on a bill of exceptions, and the only question was, whether the evidence was admissible. There was plenty of other evidence to support the verdict. But though this was the only question, it is, I think, impossible to read the opinion of Mr. Justice *Willes*, without seeing that he thought the weight of such evidence when received depended upon circumstances.

Mr. Justice *Lawson*, in his able opinion, treats it as a kind of *reductio ad absurdum* that it could be supposed that the jury could on this evidence infer that the Crown was not in possession in 1660. With deference to him, I think the question is slightly different, and is whether the jurymen were bound to infer that the Crown was in possession in 1660. And (supposing,—which is not the fact,—that there was no evidence of acts of ownership on the north end of the lough, and that the evidence was that during living memory the whole lake was treated as the southern and much the larger end was) I think the jury might reasonably think that the probability was great that *Cromwell* put Sir *John* in actual possession of the fishings in the *Bann River*, which were capable of a manual prehension; but that it was not improbable at all that he merely said that Sir *John* should have the lough without giving him possession, and that in his time the whole lough, was treated just as (on this supposition) the lough was in modern times, a claim to it being set up, but no possession at all taken. I cannot think a Judge would have been justified in directing the jury that they could not infer this.

But there is evidence of things done since 1811. And those things are evidence proper to be submitted to the jurymen to see if they would not draw inferences which would support the Plaintiff's case. The acts of ownership done in Lord *O'Neill's* time from

(1) 10 H. L. Cas. 593.

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1837 to 1872 along his demesne would justify the jury in drawing an inference that similar acts had been done during the long interval from 1661 to 1837. But they were not bound so to infer; and if they inferred that Lord *O'Neill* took the sub-lease in order that he might have a paper title to assist in protecting his own demesne, and the fishings in the lough along it, and that the acts of his keepers were novelties which had not taken place in the time of the lessees before the sub-lease, I am not at all sure that, on this evidence, they would be wrong. It is chiefly on this part of the case that I think the guarded terms of the lease of 1811 material. This is a modern period, and more and clearer testimony can probably be obtained on one side or the other.

Again, acts of ownership on parts of a tract are evidence to prove ownership on the whole: *Jones* v. *Williams* (1). Lord *Abinger* there intimated an opinion that it would not by itself be of great weight. Mr. Baron *Parke* said (2): "It is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the Plaintiff, if the other parts did." This, which I think is the right rule, makes the weight of the evidence depend on the nature of the locality, and of the acts, and on what it is reasonable for a jury to infer. In the present case the jury might infer that Lord *Donegall's* sub-tenant Lord *O'Neill*, if he was exercising acts of ownership at the one end of the lough was owner of the other end twenty miles off; but I think the Judge could not properly tell the jurymen that this inference was so reasonable that they must draw it.

These different pieces of evidence must all be taken together. They do, when together, form a much stronger case than the sum of the cases which each separately would make. But, in my opinion, they do not altogether amount to such a case as that the jury could properly be directed that there must be a verdict for the Plaintiff.

(1) 2 M. & W. 326. (2) 2 M. & W. at p. 331.

On this evidence I think it was for the jury to say whether either Sir *John Clotworthy* in 1660, or any of the Earls and Marquises of *Donegall*, by themselves or their tenants, ever were in possession of the land covered by water at *Feumore*, or the fishing in the lake there, and the jury might, I think, not unreasonably say that that was not proved by this evidence.

On a new trial fresh evidence may be given, on either side or both, and the whole question may be changed.

LORD GORDON:—

My Lords, the question in the present case relates to the title to real estate in *Ireland* and possession following thereon, involving the question of right to the subject in dispute, the law regulating which is the same as that of *England*. The law of *Scotland* is so very different, that such a question as here arises could not there occur. The system of titles to real property, by instruments of sasine, and of their preservation in the official records, effectually prevents any questions arising in regard to the possession following on grants from the Crown, or conveyances of property between ordinary proprietors. But, of course, the present case has to be decided according to the law of *England*, and I have carefully considered it, and the argument which was addressed to the House from the Bar, and the authorities which were referred to. On the important question as to the right of the public to fish on an inland navigable and non-tidal lake, which, though raised in the Court below, is not now properly before the House, I say nothing. I have had the advantage of considering the judgments which have been delivered to your Lordships by the Lord Chancellor and Lord *Blackburn*, and I concur in the result they have arrived at. Evidence of possession was necessary, and as that was a question of fact, it ought to have been left to the jury. That not having been done, the order for a new trial was therefore right, and the judgment appealed against must consequently be affirmed.

The following Order was afterwards entered on the Journals:—

That the Order of the Court of Exchequer Chamber in *Ireland*, of the 12th of May, 1876, be

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affirmed, and the appeal be dismissed this House: And that the surviving Appellant, *J. G. Livingstone*, do pay to the Respondents the costs incurred in respect of the appeal, the amount thereof to be certified by the Clerk of the Parliaments.

Lords' Journals, 28th March, 1878.

Solicitors for the Appellant: *Cutler & Co.*
Solicitor for the Respondent: *P. Burrowes Sharkey.*

[HOUSE OF LORDS.]

H. L. (E.) LOUIS BRESLAUER . . . . . APPELLANT
1878
AND
March 28, 29; *April* 1. ARTHUR BROWN . . . . . RESPONDENT.

Bankruptcy—Composition with Creditors—32 & 33 Vict. c. 71—Contingent Claims.

4 C.B.D. 196
5 Ex.D. 168
5 C.P.D. 355
16 Ch.D. 131
141
18 Ch.D. 491
23 Ch.D. 708

A bankruptcy and a composition arrangement under the 126th section of the *Bankruptcy Act*, 1869, differ materially from each other.

By the 126th section of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), a debtor seeking to obtain a composition with his creditors is bound to make a statement of his debts with the names and addresses of his creditors. By sect. 31 of the Act contingent claims are proveable in bankruptcy, and the 126th section renders them proveable in a composition arrangement. A debtor filed a petition to obtain such an arrangement, and inserted in his statement the name and address of a creditor, describing a certain sum of money as due to him; the creditor claimed a larger sum, obtained the allowance of it, signed a composition deed (the composition being payable in one month from the registration of the deed), and received the composition agreed to by the creditors. While this arrangement was being made, a suit in the Court of Admiralty was proceeding against the debtor, in which suit the creditor had given a bond, as surety for the debtor, for the payment of any costs and damages found due in that suit. The liability on this bond was in no way referred to in the debtor's statutory statement. After the composition had been completed, and the composition had been paid, the Admiralty suit was decided against the debtor, and, on default by the debtor, the creditor was called on to pay the amount secured by the bond:—

Held (*dub.* LORD GORDON), that, under these circumstances, an action for

money paid under the Admiralty bond was maintainable against the debtor, no mention of the bond having been made in the statutory statement, and such payment therefore, not being affected by the provisions of the 31st and the 126th sections of the *Bankruptcy Act*.

The conditions imposed by the 126th section of the *Bankruptcy Act*, 1869, are conditions for the benefit of the creditors. The creditor may waive them—the debtor cannot.

Per LORD BLACKBURN:—A resolution to accept a composition and the acceptance of it have not the same effect as a discharge in a regular bankruptcy.

If an estimate of a contingent debt can be made so as to be inserted in the statement, the statute throws the burden of making it on the debtor. If its amount could not be estimated in any way, the resolution of the creditors agreeing to a composition on other debts could not affect it.

Ex parte Carew (1) approved.

The observations made in *Campbell* v. *Im Thurn* (2) commented on.

APPEAL from an order of the Court of Appeal, which had reversed a decision of the Common Pleas (3).

The following is a summary of the facts. *Breslauer* was the owner of a ship called the *Ringdove*, that ship came into collision with another vessel, and a suit was instituted in the Court of Admiralty to recover damages from *Breslauer*. He was, according to the practice of the Admiralty, required to give a bond with sureties to meet damages and costs. *Brown* was one of the sureties. Before the suit in the Admiralty was heard *Breslauer* presented a petition under the Act of 1869 for liquidation of his affairs by arrangement or composition with his creditors. A meeting of the creditors was held; a statement of the debts was put in, and a composition of 2*s.* in the pound was assented to by the creditors. In the statement as originally prepared by *Breslauer* a sum (£586) was named as his debt to *Brown*, smaller than the latter claimed, and *Brown* was allowed to amend the statement, and his claim to composition was, on the proof he gave in, fixed on the calculation of a larger sum, namely, £942. *Brown*, who had appeared at the meetings and voted, signed the deed of composition and received the amount which had been agreed upon. No mention of the existence of the Admiralty bond was made in the statement. The suit in the Court of Admiralty was, after the compo-

(1) Law Rep. 10 Ch. Ap. 308.
(2) 1 C. P. D. 267.
(3) The facts are fully stated in the report of the decisions of the Court below, 2 C. P. D. 314, 330.

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sition arrangement, and after the payment of the composition, determined against *Breslauer*, and as he did not satisfy his liability on the bond, the sureties were called on, and *Brown* paid £399 14*s.* 6*d.* *Brown* then brought an action against *Breslauer* to recover the sum he had thus been obliged to pay. The defence set up was the composition agreed to by *Brown* in common with the rest of *Breslauer's* creditors (1).

The cause was tried before Lord Chief Justice *Cockburn*, at *Hertford*, in July, 1876, and in Michaelmas Term, upon a motion to enter judgment for the Defendant, the Common Pleas ordered the judgment to be so entered. The Court of Appeal (Lords Justices *James*, *Baggallay*, and *Bramwell*) reversed this judgment, and ordered judgment to be entered for *Brown* (Lord Justice *Brett* dissenting, and declaring his opinion that the judgment of the Court below ought to be affirmed). This appeal was then brought.

(1) The following are the material parts of the sections and sub-sections of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71):—

Sect. 31 declares that "'Liability' shall, for the purposes of this Act include . . . any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether such payment be, as respects amount, fixed or unliquidated; as respects time, present or future, certain, or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion."

Sect. 126: The creditors of a debtor unable to pay his debts, may, without any proceedings in bankruptcy, by an extraordinary resolution, resolve that a composition shall be accepted in satisfaction of the debts due to them from the debtor.

The third sub-section requires the debtor to be present at the meetings where such a resolution is to be passed, and to "produce to the meetings a statement shewing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due."

Sub-sect. 4: The resolution is to be registered.

Sub-sect. 6: The provisions of the composition thus resolved on "shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

Rules in Bankruptcy were made under this statute. The following was the Rule most material to this case:

Rule 270: "All debts which would have been proveable in bankruptcy had the debtor been adjudicated bankrupt at the date of the institution of the proceedings, shall be proveable under any such proceedings."

Mr. *Horton Smith*, Q.C., and Mr. *Lumley Smith*, for the Appellant:—

The facts here are not disputed. The chief question is one which arises on the 126th section of the *Bankruptcy Act*, 1869. This really was a debt capable of being ascertained; no matter whether it was enforceable at the moment or not. At the very time that *Brown* signed the composition deed, *Breslauer* was under the liability which was now sought to be enforced against him. The liability was settled, the amount alone was contingent, but the amount might have been suggested: *Ex parte Peacock* (1). Untaxed costs were there declared to be proveable, which shewed that the debt here might have been stated at a probable sum. If not so stated and claimed, but altogether omitted from the arrangement then made with the creditors, it cannot now be enforced. This action could not have been brought under the old bankruptcy law, for the debt would have been proveable in bankruptcy, nor can it be sustained now, for if the debt would have been proveable in bankruptcy it was proveable by virtue of the 126th section and the 270th rule in the composition arrangement. The registration of this resolution of the creditors was conclusive by the effect of the 127th section of the statute.

The object of the statute was, upon a composition being effected, to make the debtor a free man. That object would be defeated if such a proceeding as this could be sustained. And so would be another object of the Act, of even still greater importance, the object of securing equal justice among the creditors. A statement of the debts was required. Why? That everybody should know the grounds on which his assent to a composition was asked, and should be enabled to consider and estimate what ought to be the amount of that composition. Upon that knowledge the creditors were to give or to refuse their assent to the proposed arrangement. But the whole of this proceeding, specially intended for the general benefit, would be simply nugatory, and the assent of the creditors would be obtained upon a deception, if, after they had listened to what they believed to be a full and true statement of the debtor's affairs, and had thereon agreed to a composition, and had received

(1) Law Rep. 8 Ch. Ap. 682.

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the agreed composition, a particular creditor, who had himself been a party to the deed for a sum which he allowed to appear on it as if it was his whole claim, could enforce a demand upon a title which had existed before the date of the deed, but which had never been communicated to the knowledge of the creditors, but had been concealed from them. The 126th section made the provisions of a composition deed absolutely binding on the creditors whose names and addresses were shewn in the statement of the debtor. The very act of signing the deed of composition was, under the statute of 1869, a ground for restraining a creditor, who had signed it, from proceeding at law: *In re Thorpe* (1). And *Campbell* v. *Im Thurn* (2) really works out the principle to its full extent, for it, declares those creditors who come in and join in passing the resolution are bound by it, even though their names had not originally been inserted in the statement made by the debtor. Here the name and the address had been inserted, the amount of the debt stated, and the creditor had so fully entered into the matter that he objected to the amount stated, claimed a higher amount, got his claim admitted, signed the deed for the higher amount, and received upon it the composition agreed to by the creditors. Nothing could be more complete; and he could not be heard after that to say that he had not come in under the composition deed, and was not to be bound by its stipulations, but was to be treated in a way different from all the other creditors, and as if he had been wilfully kept a stranger to all the proceedings. The claim here might have been made and the probable amount given, and the trustee and the Court could have been appealed to had the parties differed about that amount.

Melhado v. *Watson* (3), *Megrath* v. *Gray* (4), *Jacob's Case* (5), and *Carew's Case* (6) were cited and commented on.

Mr. *Grantham*, Q.C., and Mr. *R. V. Williams*, for the Respondent:—

By neither the debtor nor the creditor was this particular liability supposed, or intended, to be included in the statement. It

(1) Law Rep. 8 Ch. Ap. 743.
(2) 1 C. P. D. 267.
(3) 2 C. P. D. 281.
(4) Law Rep. 9 C. P. 216.
(5) Law Rep. 10 Ch. Ap. 211.
(6) Law Rep. 10 Ch. Ap. 308.

was possibly believed that the liability would never assume the shape of a debt. It was not looked upon as a contingent debt, and so, it was not inserted in the statement; and though the creditor could, under the statute, correct an untrue statement of what was due to him on an existing debt, the statute gave him no power to introduce something that might never at all assume the character of a debt. In that respect, therefore, *Ex parte Peacock* (1) had no bearing whatever on this case. Costs were a debt—untaxed costs were simply a debt the exact amount of which had not been ascertained; but being a debt their amount might be stated approximately, and being so stated could properly be inserted in the account laid by the debtor before his creditors. They came within the very words of the 31st section; they were a declared debt, though their amount was contingent, and if wrongly stated the statement would be capable of correction; and the section allowed that amount to be proved as a contingent debt. Nothing of that sort could be said of the liability under the Admiralty bond, which might never assume the character of a debt, and, until it did so, its amount could never by possibility be made the subject of calculation. In the case of *Melhado* v. *Watson* (2) the debtor inserted in his statement the name of the creditor, and stated that a claim was made for a sum of £94,000, but that claim was resisted, and was then under arbitration. The award shewed that that sum had been enormously exaggerated, but it also shewed that a real debt had existed at the moment the statement was made. The award was not made till some time after the composition had been agreed to, but there, as well as in *Peacock's Case*, the amount alone was contingent; there was an actual legal debt existing, though the amount was unascertained.

The principle of the case here was clear, and the cases cited on the other side had never, in any way, affected the application of that principle. Here no reference to this possible liability on the Admiralty bond had been made in the debtor's statement; the creditor could not set it forth as a debt, for the decision of the Court of Admiralty had not been pronounced, and *Breslauer* might have been altogether exempted from liability, and even declared entitled to damages and costs, and in no way could a

(1) Law Rep. 8 Ch. Ap. 682. (2) 2 C. P. D. 281, 291.

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claim have been properly put forward for any sum whatever. The money was paid at the request of the Defendant; it was paid after the date of the composition, and had all the character of a new transaction between the parties. The right of action was not taken away by the composition, for no right to demand the money existed when the composition was made, and no right could be barred until the right itself had actually come into existence; and the composition was to be paid at a time when the Admiralty suit would not be decided. As the possible claim itself has never been mentioned in the debtor's statement, it could not be affected by the words of the section, for those words expressly required names, addresses, and debts to be mentioned. If debts existed, though their amount might be contingent, they must be mentioned; but if they did not exist as debts, the words of the section could not be followed, and then the section itself could have no operation. This was not like the case of a regular bankruptcy, and it was a mistake to treat it as one, and as if there had been a regular discharge in bankruptcy.

Mr. *Horton Smith* replied.

LORD HATHERLEY:—

My Lords, in this case the Respondent *Brown*, together with one *Wilson*, was Plaintiff in an action against the Appellant *Breslauer*, in which action (*Wilson* having been dealt with separately), *Brown* sought to recover the amount of certain moneys paid by him on account of *Breslauer* in respect of a joint and several bail bond dated the 1st of February, 1875, which was given by *Brown* and *Wilson* in the Admiralty Court in order to release a ship of *Breslauer's* called the *Ringdove*. That ship had been attached in a suit in the Admiralty Court relating to the running down of another vessel called the *W. H. B.*, and proceedings were pending in that Court which resulted finally in a judgment of £1500 and upwards, with costs, against the *Ringdove*, and that judgment was satisfied by *Brown* and *Wilson* paying the amount of the debt in moieties.

In the meantime, however, after the giving of the bail bond, but before the decision in the Court of Admiralty, *Breslauer* had

found it necessary to take proceedings under the *Bankruptcy Act* by which he might come to a composition with his creditors. At the time of *Breslauer's* so taking proceedings he was indebted to *Brown* (in respect of dealings with *Brown* other than this question of bail bond) in two several sums, amounting together to £942 11*s.* 1*d.* of liquidated debt. In this state of things *Breslauer*, on the 24th of May, 1875, presented a petition in bankruptcy pursuant to the *Bankruptcy Act* of 1869, and he proceeded to take steps with the view of obtaining a composition with his creditors under the 126th section of that Act. In doing so, he was bound under the 126th section to bring in a statement of his affairs, and in that statement of his affairs he inserted the name of *Brown* under the firm or style by which *Brown* traded. *Breslauer* there stated the amount of the debt due to *Brown* as £586 6*s.* 1*d.*, and he valued certain securities held by *Brown* in respect of that debt at £124.

On the 3rd of July, 1875, *Brown* made an affidavit in the matter of the insolvency, and in that affidavit he stated the debt due to him to be £942 11*s.* 1*d.*, and not £586 6*s.* 1*d.* only. This statement of his was acceded to by the debtor and not disputed in the proceeding by any of the other creditors, and *Brown's* claim was accordingly entered as for £942 11*s.* 1*d.* in the same form as it had been entered before, as that of *A. Brown & Co.* Thereupon a meeting was held, as is directed by the 126th section, and on the 5th of July, 1875, an offer to the creditors of a composition of 2*s.* in the pound was agreed to be taken by the statutory majority of *Breslauer's* creditors in satisfaction of the debts due to them. It was to be paid within one month after the registration of the resolution of the second meeting, and a trustee was appointed in the usual form solely for the receipt of the assets and the distribution of the composition. *Brown* signed this resolution under the style of the firm of *A. Brown & Co.*, and the sum of 2*s.* in the pound was duly paid upon the debt of £942 11*s.* 1*d.* which he had claimed. But, as I said before, nothing was done upon the question that was pending in respect of the bail bond, and indeed the decision of the Admiralty Court had not at that time been come to.

After all this had been done, and the 2*s.* in the pound had been

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arranged as the composition upon the debts, including that debt of £942 11*s.* 1*d.* due to *Brown*, a decision was come to by the Court of Admiralty in the month of February, 1876, and on the 19th of February, 1876, the bail-bond was satisfied by payment, by *Wilson* and *Brown*, of the sum which had to be paid, and in respect of a moiety of which payment, subject to a deduction, the present claim is made. I do not think it necessary to enter into certain policies of insurance which *Brown* held, and which were partly security for the debt; after deducting which, it amounted to a considerable sum—the sum, at all events, which is now claimed in this action.

My Lords, *Brown* having brought his action for what he had paid in respect of the bail bond after deducting the value of his securities, that action was tried before the Lord Chief Justice of *England* originally. No dispute as to the amount that was originally due to *Brown*, £942 11*s.* 1*d.*—arose at the trial at all. I should have said that neither the £586 8*s.* 1*d.*, nor even that sum together with the additional sum which made up the £942 11*s.* 1*d.*, included the liability under the bail-bond; in other words, it had not been satisfied in substance by the proceedings which had taken place in the insolvency; whether it had been satisfied in point of law is the question we have now to consider.

Leave, however, was given in the Common Pleas Division to enter judgment for the Defendant on grounds which I will presently state. A motion was made before that Court to enter judgment for the Defendant accordingly, and the learned Judges—Lord *Coleridge*, Chief Justice, Mr. Justice *Grove*, and Mr. Justice *Denman*—were unanimously of opinion in favour of the Defendant, and ordered accordingly. The Plaintiff in the action, who is the present Respondent, appealed from that decision to the High Court of Appeal, and in that Court, by a majority consisting of Lord Justice *James*, Lord Justice *Baggallay*, and Lord Justice *Bramwell* (Lord Justice *Brett* being of a different opinion), the decision of the Common Pleas Division was reversed, and judgment was directed to be entered for the Plaintiff. It is from that decision of the Court of Appeal that Mr. *Breslauer*, the Defendant in the action, has brought the present appeal to your Lordships' House.

Now, my Lords, this question lies in a very narrow compass indeed, and it appears to me that the decisions which have been already come to with reference to the 126th section of the *Bankruptcy Act* of 1869 lead directly to a solution, and a reasonable and a proper solution, of the present question. The point in question is this. The 126th section of the *Bankruptcy Act* enables a debtor who finds himself to be insolvent to present, if he be so minded, a petition to the Court praying that his affairs may be wound up by liquidation, instead of being wound up in bankruptcy; and then steps are pointed out in the 126th section as to the proceedings which shall be taken, and as to how the composition which he is willing to offer to his creditors may be dealt with in case it should be accepted by those creditors. The 31st section of the *Bankruptcy Act* of 1869 allows a good many contingent debts to be proved; indeed, I may say almost any contingent debt that can well be conceived, supposing it to be capable of estimation, and capable in that sense of being established, with the exception of debts which have accrued by way of damages for torts.

That being the case with regard to bankruptcy generally, if we take the 126th section coupled with the 270th rule in bankruptcy, which declares that any debt provable in bankruptcy may be provable also under a liquidation, or under an arrangement by composition with creditors, it would appear that a debt although contingent might—it is not necessary for the present case at all to decide that question, but I only say it might be so, and I assume it for the purpose of this question—might, if proper steps were taken, be proved under an arrangement for a composition, provided the proof given were assented to by the creditors.

But the proceedings under the 126th section differ entirely from the proceedings by way of bankruptcy proper, or the proceedings by way of liquidation otherwise than by composition in this respect. The Legislature has laid down in very plain terms what is the duty of a debtor who seeks to settle his debts by composition with his creditors. The provisions of the Act are these:—By the 4th sub-section of sect. 126, the debtor is to produce to the meetings of his creditors "a statement shewing the whole of his assets and debts, and the names and addresses of the creditors

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to whom such debts respectively are due." That is his duty, and I say it is his duty advisedly, having regard to the course of decision which has taken place in reference to this subject-matter.

My Lords, the decision in the case of *Ex parte Carew* (1) was one of the first which I think very distinctly and clearly stated what I consider the true doctrine ought to be, with reference to the debtor's making this full statement. It is contained in the judgment of Lord Justice *Mellish* given in that case (2). In that case the debtor had set forth a certain amount of debts due to his creditors, but there was a Chancery suit pending with regard to a breach of trust on the part of the debtor, as to which he was not minded to make any admission whatsoever with regard to the claim or its amount. As regarded the other creditors he proposed to pay 19*s.* 11*d.* in the pound upon their debts, but he declined, apparently purposely, admitting in any sense his responsibility with reference to the debt which was said to be due with regard to an alleged breach of trust. He consequently left the creditor, who claimed upon that, in the condition of taking any such steps as he might be advised in the matter, but he did not include, and shewed no intention to include that debt within his composition. But in making provision for the payment of his debts, it turned out that notice had been given, by those who were suing him in respect of this breach of trust, of their existing claim; and the directors of an insurance office, from which the debtor had procured a sum of money in order to meet the sums due by way of composition at the rate of 19*s.* 11*d.* in the pound upon the debts that he was willing to pay, having heard of this notice, said that they should not make this advance unless some sort of provision was previously made with respect to this debt which had also been claimed with regard to the breach of trust. Accordingly a sum of money was put into the hands of the trustees to be ready to meet any such claim if it could be established; but the debtor questioned the right of these parties who were so suing him to have any payment made to them, or to be regarded as his creditors. It turned out that a considerable sum was established as due in respect of that trust. The debtor then applied to the

(1) Law Rep. 10 Ch. Ap. 308.
(2) Law Rep. 10 Ch. Ap. at pp. 313, 314.

trustees to hand him over the balance of the fund which was in their hands for the payment of the composition on his debts, but they refused to do so. The debtor said, I have never agreed to that debt, and you have nothing to do with that debt as my trustees, and I have nothing to do with it in respect of any arrangement or composition I have made with my creditors. Then the creditor came in and said, I find this sum of 19*s.* 11*d.* in the pound for my debt in the hands of one who has received it from my debtor; it is for the payment of the debts due under his composition, and I now elect to come in under the composition and claim 19*s.* 11*d.* in the pound upon my debt.

The question was whether or not it was competent for him so to do, and Lord Justice *Mellish* held distinctly that the provision in question with regard to a debtor's making a full statement of his debts with reference to the distribution of the money to the creditors who were willing to come in and accept that composition—a statement of the name of the creditors and their addresses and the amount due to each of them—that the statement of all these particulars was a statement which was directed by the Legislature to be given for the benefit of the creditors and not for the benefit of the debtor, and inasmuch as any man may waive, for a time, a condition which is only provided for his benefit, Lord Justice *Mellish* held that the creditor in that case might, as against the debtor, come in at any time before the actual distribution of the fund had been completed, and say that he waived all those conditions as to his name and address and the amount due to him being stated in the schedule, and that now he elected to have the benefit of the composition, and that benefit was given to him accordingly.

My Lords, that case goes a long way towards shewing whose duty it is to make this statement and for whose benefit it is that this statement is required to be made. What the Legislature in fact has done is this. It has said, If you wish to have a clearance of your liability by means of this procedure of composition instead of by means of the compulsory process in bankruptcy, then you must make a full and clear statement, and the only discharge, or rather it is not a discharge, but the only relief, you can get in respect of your debts will be a relief given you in respect of those debts which you owe to creditors whose names you have scheduled,

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and whose addresses you have set forth, and the amount of whose debts you have stated,—it shall not be a relief to you in respect of any other debts whatever. But the decision shews that a creditor may waive those conditions, and, waiving them, may take the benefit of a payment made by way of composition. That, my Lords, is one case.

Another case which touches almost the same point is the case of *Melhado* v. *Watson* (1), but in that case a different state of things existed. It appears that the debtor, who was seeking the benefit of the composition, had stated that a very large debt was claimed —he stated the names and addresses of the claimants, and he stated the debt in this way—in the column for "Names of creditors claiming to hold security" he put first "*Alfred Melhado*," then "*David Lloyd*," then "*Nathaniel Plant*," and against the name of "*Nathaniel Plant*" he put in the column for "amount of claim" "£94,000;" but he put this note "acting under legal advice, this claim was resisted, and became the object of an action and reference to *J. H. Lloyd*, Esq., which reference is now pending," and he put it down then "from folio 22" "£3360," that is a little addition for interest, making altogether £97,360; but he stated it in the manner I have just read as a claim which was made but was not acquiesced in, but, on the contrary, disputed, and at that moment under arbitration. The case was decided afterwards in this way. The claimants obtained an award from the arbitrator in their favour, and having obtained that award they proceeded to sue the debtor for the full amount of their debt. The debtor there, as here, said, A composition has been made: you are bound by that composition, and in consequence of that composition this debt is no longer payable,—I have obtained a statutory release. And Mr. Justice *Denman* appears to have been of that opinion in the Court below. But there was an appeal to the High Court of Appeal whereupon that decision was reversed, and the reason given by Lord Justice *James* is this (2): "I am of opinion that sect. 126 has no application to the present case. A composition under that section is a matter between a debtor and his admitted creditors. A debtor cannot be permitted to dispute a creditor's debt and at the same time to compound for it; he cannot force

(1) 2 C. P. D. 281. (2) 2 C. P. D. 291.

the creditor to an arbitration and claim to pay him a composition as the result of that arbitration. Sect. 126, which provides that a non-assenting creditor shall be bound by the votes of other creditors, says that he is to be bound in certain events. These events must be shewn to have happened before he is bound. The section provides that the composition accepted in pursuance of this section shall be binding on all the creditors whose names and addresses and the amount of debts due to whom are shewn in the statement of the debtor produced at the meeting" . . . "but shall not affect or prejudice the rights of any other creditor."

Now, my Lords, in that case the debtor seemed to think—and it is a very strange contention when you to consider the substantial justice of the case—that if he put down the name of the creditor, and if he put down the amount of his debt, he complied formally —so far as such a description can be applied to such a mode of procedure—with all the provisions of the 126th section with regard to the information to be given as to the creditors, and he said that he had discharged that duty by stating the amounts claimed by the several creditors, and the names and addresses of those creditors. Thereupon he says: I do not admit the debt at all. I only state it because they have made the claim. And then, when the award is made, he seeks to set up the composition as a statutory discharge which he has received in consequence of his having, as he contends, fulfilled all the requirements and forms of the section. That, again, proves that it is a duty incumbent upon the debtor to set down the name and address of each creditor and to set down the amount of the debt which he is prepared to offer a composition upon, that being the sole meaning of the necessity of inserting the amount of the debt at all.

My Lords, these two cases go a long way towards settling the true meaning of this section of the Act of Parliament. There is another, namely, *Ex parte Peacock* (1), which is not altogether unimportant. There certain costs had to be taxed which were not taxed at the time of the debtor availing himself of the 126th section of the *Bankruptcy Act*. These costs came to be taxed afterwards, but in that case the debtor did not act exactly as the debtor had acted in the case I have just cited of *Melhado* v.

(1) Law Rep. 8 Ch. Ap. 682.

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Watson (1), because the probable amount of the taxed costs was put down as an estimated amount, and that estimated amount was spoken of. But there, again, the sum was not admitted, neither did the creditor claim a composition upon this estimated amount at the time appointed by the deed; and there the Court held that he could enforce his claim because the debtor had not complied with the provisions of the deed, and that if the debtor takes the right step (and it is the right step) of putting down the estimated amount, he must go and act upon it, after bringing the creditor into the arrangement, by paying, or offering to pay to the creditor the amount under the composition. That was not done in *Ex parte Peacock* (2), and therefore the debtor was not released.

My Lords, all these decisions appear to me to shew what the true construction of the section should be. I do not stop to inquire as to the question which is discussed in some of the reasons given by the learned Judges in the Court below. I do not stop to inquire whether or not this being a contingent debt it could have been proved or not. I assume that it could have been proved if the parties had been so minded, but neither party did so prove or estimate it, or take any steps at all about it. If it had been proved at all (and it is possible that there may be cases which admit of that method of procedure under the 270th rule and the 31st and 126th sections) it could only have been proved by way of estimate. An estimate must be made of the amount of the moneys due, and when you have made that estimate you must get your creditor's assent to it, or, according to the mode which is provided by the Act, you must get an estimate by the Court. When such steps as these have been taken it is possible—I say no more than that it is possible—that such a contingent debt might have found its way into the list by way of arrangement and agreement between the parties.

Observe, my Lords, what a composition is under the 126th section. It proceeds necessarily, not upon the compulsory power of the *Bankruptcy Act*, but upon an arrangement and agreement come to with the creditors, differing from a voluntary arrangement with all the creditors, in no other respect than this: that under the 126th section power is given, when all proper formalities have

(1) 2 C. P. D. 281. (2) Law Rep. 8 Ch. Ap. 682.

been complied with, of binding the minority of the creditors by a decision come to by the majority. But still in that case the debtor must state the names and addresses of his creditors, and the amounts of the debts due to each of them. If it be a contingent debt, the amount of that debt may be estimated and the estimate agreed to; if it is not agreed to, the amount must be settled by the Court. When all that is done, and not before, the debtor obtains a release, according to the Act, for all debts with respect to which the names, the addresses, and the sums, have been inserted in his statement, and the resolution has been duly certified to the Registrar of what the arrangement of composition shall be.

Now, my Lords, in this case what has happened? Here is a debt of a very contingent nature indeed. At the time of the debtor presenting his petition under the 126th section he was in this position—he who afterwards became his creditor had already entered into that contract by which he so became a creditor, but the debt had not, at the time of the petition being presented, or at the time of the composition being accepted, been even established, much less ascertained. It had not even been established that the one ship had wrongly run down the other; it had not been established that the debtor himself might not pay a part or the whole of the debt which might possibly be found due as against his ship the *Ringdove*; it had not been established therefore what the contribution was to be on the part of his sureties, or even whether any would be required. But a considerable time after the payment of the instalment which was to be paid in respect of his composition had become due, all these facts were ascertained. He had taken no steps to have the debt ascertained, as I have described, either by getting an estimate of it agreed to, or by a procedure before the Court. He had done nothing, but simply omitted the debt from his statement. And the question is, can he be discharged under that section of the Act which says that those debts shall be discharged, and those only which are due to persons whose names, addresses, and amounts of debts, appear in the statement? Can it be said that this debtor having one large contingent debt which does not in any way appear upon the face of the deed or statement, ought to be discharged or can be dis-

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charged, by the operation of the statute, from the claim of this creditor as coming within the description of creditors whose names, addresses, and the amounts of whose debts shall appear? The amount of this creditor's debt does not appear, nor even the mention of the debt, and there is no default on the part of the creditor.

The only arguments which have been adduced before us in respect of this matter are arguments rather pressing upon the possible danger of fraud and damage to the other assenting creditors which would result, it was said, if a debt could be kept from their knowledge and not entered in the list, and if a creditor could appear and act in respect of two other debts (which in this case amounted together to £942 11*s.* 1*d.*) as due to him, and which appeared to be all that was due to him, and yet afterwards could come and claim the full amount of a debt subsequently ascertained, without being bound by the deed he had executed or by accepting the composition under it.

My Lords, no question of fraud upon the other creditors is raised at all in this case. The other creditors have received the full amount of the composition they agreed to receive, and no suggestion has been made of any collusion at all between the debtor and the creditor in this case. We are not informed how the omission to enter this liability in the list came to pass, but the most reasonable presumption is that one of two things occurred, either of which would come to the same result—either they may have agreed that this was so difficult a claim to be estimated that it was not a thing to come to an agreement upon, and consequently they had better omit it altogether, as the Judge would possibly think when it was brought before him; and they did omit it altogether possibly on that ground. Or they may have thought that this outstanding liability which had not yet resulted in debt might possibly not result in debt at all. There is no reason whatever for supposing that the matter was kept out in any way which could be regarded as a fraud upon the other creditors, and, if you come to the question merely as between this debtor and this creditor what have you? You have a debt due which was not provided for in the deed, and which has not been paid, and therefore no composition was offered, or could be offered upon it, there

was no party appearing or acting upon it, and consequently it being unpaid it ought now in common justice and honesty to be paid.

My Lords, the case which the learned Judges in the Court below seemed to rely upon very much, is the case of *Campbell* v. *Im Thurn* (1). That case appears to me, if I may say it, with great respect to a very learned Judge who took part in this decision, Lord Justice *Brett* (who had been one of the Judges who decided *Campbell* v. *Im Thurn* (1), and who made reference to it), to be a case which has not any bearing upon the special point now brought before your Lordships for decision. The case of *Campbell* v. *Im Thurn* (1) was simply this: A man, whose name, address, and debt were not inserted in the list sent in by the debtor, nevertheless comes into the arrangement, appears and makes a claim in respect of what he alleges to be due to him as his debt; he accepts a composition upon that debt, and in fact does everything as if his name had been inserted, as if his address had been inserted, and as if the amount of his debt had been inserted. The Court of Common Pleas there says, if the parties have made such an agreement, a party who so acts shall not be at liberty afterwards to say, when all that has been done, that he has not waived the conditions inserted in the 126th section for his benefit; and having waived those conditions, according to the maxim *volenti non fit injuria*, the Court held him to be justly bound by the agreement.

It was said, I think by Lord Chief Justice *Coleridge*, that he could see no difference between an acquiescence in the non-fulfilment of the other conditions, and acquiescence in the amount of the debt; as if Mr. *Brown* here, by coming in and being cognisant, as he certainly was from the beginning to the end, of all the proceedings, by coming in and accepting his dividend upon the sum of £942 11*s.* 1*d.*, could put himself in exactly the position of Mr. *Campbell*, who came in waiving the conditions as to the name and address and the amount of the debt being inserted in the statement of the debtor; and, therefore, said the learned Judge, why should not the same hold good also when a man comes in and accepts a statement of £942 11*s.* 1*d.* as the amount of the debt

(1) 1 C. P. D. 267.

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due to him, instead of a larger sum which may become due to him in respect of a contingent debt? If he had done that, if the amount of the debt had been estimated, and the amount of the debt put down upon the composition deed—or, if outside that arrangement, he had said, I will agree to an estimate of this contingent debt at so much, and I will take 2*s.* in the pound upon it, or anything like that, the case would have been like the case of *Campbell* v. *Im Thurn* (1). But how can a man, by taking a composition upon a fixed and certain debt, be said to be waiving the condition so as to bring in what he might have brought in, but what I hold he was in no respect bound to bring in, that being the duty of the debtor himself, namely, a mere contingent liability? If a man chooses to take a composition upon a fixed and certain debt owing to him, how can it possibly be said that that, in effect, amounts to a payment of another debt which never was paid, and upon which no composition was paid, and for which no agreement at all was come to, and which, unless struck at by the *Bankruptcy Act*, cannot be denied to be a debt still due in common honesty from the Defendant to the Plaintiff? My Lords, I looked to the section to find an enactment which would give relief from such a debt. The Act is careful and precise in saying that the debts only of those whose names and addresses and sums are stated, are to be considered as discharged, and no others.

Now, my Lords, I have carefully looked through the judgments of the learned Judges in the Common Pleas Division, who were unanimous in the view they took of this case, but I venture to differ from them upon this simple view. It has now been made clear, I think, by decisions in cases which have not come to your Lordships' House, but which I think have been rightly decided, that this is a condition on behalf of the creditors, and that a creditor may, if he thinks fit, waive it, and, if he waive it, he is in the same category as others with regard to whom the condition has, according to the precise words of the enactment, been complied with. If he does not waive it, then in the absence of any fraud and in the absence of any injury to other creditors, and in the absence of anything unfair in the course of conduct he has pursued, I say in the absence of all those circumstances, he ought

(1) 1 C. P. D. 267.

to be in the position of a person whose debt has not been satisfied, and whose debt it was never intended by any one to satisfy, and, being so, I see no objection that can be made to the claim now put forward.

I am, therefore, my Lords, of opinion that the decision of the Court of Appeal should be affirmed, and being affirmed, that the appeal should be dismissed with costs.

LORD O'HAGAN:—

My Lords, I am of the same opinion. When the Appellant filed his petition in the Court of Bankruptcy, on the 24th of May, 1875, under the circumstances which I shall not re-state after the full narration of them by my noble and learned friend, the Respondent had two several claims against him: one for a sum of £942 11*s.* 1*d.*, ascertained to have been due at the date of the composition arrangement, and another, which was then unascertained and contingent, on the result of the cause of damage pending in the Admiralty Court, with reference to the bail bond entered into by the Respondent to prevent the arrest of the *Ringdove*.

The ascertained sum was dealt with in the bankruptcy proceedings; the Respondent has received a composition of 2*s.* in the pound on account of it, and, in its regard, the Appellant has no farther responsibility. The Admiralty cause has been since determined. The Respondent has been held liable to pay, and has paid, £399 14*s.* 6*d.*, as the Appellant's surety, and he has not been repaid that sum or any portion of it. The question is, has he been deprived of his right to recover it by any agreement of his own, or by the legal operation of the composition arrangement?

It was stated, amongst the reasons grounding the appeal, and, for a time, the learned counsel for the Appellant contended at your Lordships' Bar, that, consistently with the facts in proof, the Respondent may be held to have included, in the amount of his proof, the claim in respect of which he is suing in this action. And, if that were so, the appeal should certainly be allowed. But there is really no pretence for the suggestion. The Appellant entered the Respondent in his statement of affairs as a creditor for £586 8*s.* 1*d.*, which was afterwards increased by the Respondent's proof to a different amount claimed by him, for the Respondent

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claimed specifically £942 11*s.* 1*d.*, "for money lent and advanced" to the Appellant, "at his request." It is manifest that neither party contemplated the contingent liability as a matter with which the bankruptcy proceedings could have any concern. It was more than doubtful whether anything would ever be due upon it. The decision of the Court of Admiralty was uncertain. And even if it should prove adverse, the Respondent appears to have had a security by insurance which, but for the Appellant's default, would have held him harmless; but whilst the composition was to be payable within a month from the registration of the resolutions of the creditors in August, 1875, the adjudication of the Court of Admiralty, affirming the Respondent's liability on the bail bond, was not pronounced until February, 1876.

It seems to me, therefore, quite clear that, in the composition proceedings, no one dreamt of dealing with anything save the actually existing and finally established claim of the Respondent for a specific sum of money lent. All his conduct in the case,—his proof, his attendance at meetings, his acceptance of his dividend,—had relation to this, and this alone. It was so understood by the Appellant, who was equally without thought or intention of raising any question about the contingency; or seeking relief against the effects of its possibly adverse realisation. It was put out of consideration either through mutual inadvertence or mutual consent, and it appears to me impossible to say that, by any act or word of the Respondent, he agreed to waive any right which might grow out of the bail bond from a judgment against him. No doubt, as has been said, there might have been an agreement, either express or sufficiently evidenced by the conduct of the parties, which would have barred the Respondent's claim, even though it had not been formally the subject of a composition. On this point there is no conflict between the learned Judges who have differed so much on other portions of the case. They all adopt the doctrine affirmed in *Campbell* v. *Im Thurn* (1), to which case reference has been fully and sufficiently made already. But the circumstances of that case were different from those we have to consider. Here, if I am right in my view of the documents, there has been no claim for the amount now in dispute, and no proceeding

(1) 1 C. P. D. 267.

whatever affecting it, within the contemplation of the Respondent or the Appellant, or the body of the creditors. There, though the name and address of the creditor had not been entered, the amount of his debt was one of the liabilities: it was really in a position to be affected by the proceedings in which he took an active part, and he was properly held to have assented so as to preclude a subsequent repudiation of the transaction. But here there seems no pretence for saying that there was any assent in fact; and there is no suggestion that there was any design to gain an unfair advantage.

Either party might have stated the contingent claim; but neither did so: and we have had some argument as to the *onus* of making the statement:—the Respondent alleging that the Appellant should have made it, and the Appellant insisting that the Respondent's failure to make it puts him in default or bars his right to recover. In my view, the controversy is not material. If the statement was needful, both are *in pari delicto*, and the omission of both may not be injurious to either. If any distinction is to be made, the 126th section of the *Bankruptcy Act*, requiring the debtor to give an account of the "whole of his assets and debts," with the "names and addresses" of his creditors, would appear to cast on the person who seeks to be free from liability, the duty of setting forth the obligations from which he desires to be relieved.

The cases mainly applicable to the construction of this section, and enforcing the duty so imposed upon the debtor, have been already dealt with so fully by my noble and learned friend Lord *Hatherley*, that I shall not refer to them again. They make the duty plain and imperative, and indicate the proper and reasonable consequences of the neglect of it.

No doubt, on the other hand, when the creditor's proof was applied to enlarge the amount of the claim, as specified by the debtor, he had the opportunity of making it fuller by referring to the contingency. But they might, both I think, have avoided reference to it without illegality or compromise of their respective rights, if there was nothing of fraud in the avoidance: and, in certain circumstances, which may have existed in this case, it might have even have been meritorious if, in the words of Lord Justice *Bramwell*, they regarded the contingent debt as "so

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remote and uncertain that it would be unfair to apply any of the debtor's assets to it."

Seeing, therefore, that there was, admittedly, no fraud in the matter; believing that, in the actual relations of the parties, and probably their common doubt whether any debt would ever be established, and finding no trace of injury to the assets from the non-statement of a claim which could only have diminished the dividend, or of any ill design in omitting a disclosure which, as between the creditor and the debtor, it was more incumbent on the latter to have made,—I cannot hold that there was any discharge by agreement or by the conduct of the parties of a debt ascertained since the composition was completed, and confessedly still unpaid, in whole or in part.

Then, is the debt discharged by reason of the operation of the composition clauses? It is true, as has been repeatedly urged upon your Lordships, that the policy of the bankrupt law is to make the discharge of the debtor as full and free as possible. But this policy must be applied strictly according to the terms of the statute, save in so far as the operation is modified by the honest agreement of the parties; and, in the absence of that agreement, those terms do not, in my opinion, sustain the defence of the Appellant. He is not, *quoad* the claim in question, as one of "the creditors whose names and addresses and the amount of the debts due to whom are shewn in the statement of the debtor," bound, under sect. 126, by the composition resolution: for, as to that claim, there is plainly no such statement. And although contingent debts proveable in bankruptcy are also proveable in a composition arrangement, there was here no debt, in the statutable sense of the term, due at the date of that arrangement, or for some time afterwards.

I concur with the majority of the Judges in the Court of Appeal that though "by agreement the claim might have been valued and fixed, and put in the list, without such agreement it could not be. A claim of indefinite amount cannot be put in. The machinery of the composition clauses supposes that there is a definite sum due." Here, nothing could be more indefinite, and for the time, unascertainable. What the Court of Admiralty might do was wholly doubtful. Whether the liability, even if it should arise,

would not be nullified by the arrangement of which we were told, was equally uncertain; and if any one had undertaken to fix the proportion of the dividend on a claim so perfectly indeterminate, he must have failed in the attempt. Composition, within the 126th section of the statute, would have been impossible, and the parties must have been relegated to the last clause of the section, which, certainly, does not help the contention of the Appellant, or have been left to have an estimate made of the contingent debt under direction of the Court, by a machinery which is not available for recovery under this section.

I am therefore, of opinion, that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed.

LORD BLACKBURN:—

My Lords, I also have come to the same conclusion, that the decision of the majority of the Court of Appeal was right, and that the judgment consequently ought to be affirmed.

The facts are not now in dispute. [Here his Lordship gave a summary of them.] There can be no doubt that when, at the request of Mr. *Breslauer*, these two persons, Mr. *Wilson* and Mr. *Brown*, entered into that bail-bond, they did at his request incur a liability which was contingent at that time; it might be nothing, for the Court of Admiralty might have decided in favour of the *Ringdove*, in which case they would not have been liable for anything; or for £2300. Between these two limits, nothing, and £2300, the whole was contingent. It was contingent principally upon what the Court of Admiralty might think fit to decide, and that contingency was one which it would evidently be very difficult to estimate so long as the Court of Admiralty had not given its judgment. Farther than that, I do not go; I merely say, it was very difficult to estimate it. I do not say that it was impossible to make an estimate of it.

But afterwards, not however until 1876, the contingency was terminated, and the Court of Admiralty gave judgment against the *Ringdove* for rather more than £1500. Messrs. *Wilson & Brown* paid that sum and recovered back, from the securities which they held, some part of it, but there remained £800 odd which Messrs. *Wilson & Brown* paid (in equal moieties, I presume, as they had

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so taken the bond), and each of them was entitled upon that, to recover back from Mr. *Breslauer* half of that sum, or the whole sum jointly, according as the payments were made. It has become immaterial since the passing of the late *Judicature Act* which way it was, for they might sue together. As to *Wilson's* share of it there has been an answer independent altogether of the composition, but as to *Brown's* share, amounting to nearly £400, it was not, I think, disputed, and it is clearly indisputable, that, if it were not for the registration of this resolution, he would have a cause of action against *Breslauer* to recover that amount.

Breslauer, whilst that contingency was yet, in 1875, undetermined, petitioned the Court of Bankruptcy, and proceeded, under the 126th section of the *Bankruptcy Act* of 1869, to call his creditors together and to lay a statement of his affairs before them. In that statement of his affairs he put down "*Brown, A., & Co.*" as creditors. I should observe that Mr. *Arthur Brown* carried on business under the firm of *Arthur Brown & Co.*, but he was the sole partner in the firm. Mr. *Breslauer* put down under "Creditors partly secured," "*Brown, A., & Co.*, £586 6*s.* 1*d.*," then he put down that *Brown* held certain securities which he estimated at £124. He put him down therefore as a creditor for £462 6*s.* 1*d.* Had it stood there, without anything more, I do not think that it would have been arguable that that was a description and a putting down of the debt, or the contingent liability which might result in a debt, to *Wilson* and *Brown* from their having at his request entered into the security and submitted to the jurisdiction of the Court of Admiralty. An endeavour was made to argue at your Lordships' Bar that inasmuch as the 127th section of the Act of 1869 provides that "the registration by the Registrar of a special resolution" "shall in the absence of fraud be conclusive evidence that such resolutions respectively were duly passed and all the requisitions of this Act in respect of such resolutions complied with," it was, I say, endeavoured to be argued that the registration was conclusive, that the contingent liability to Messrs. *Wilson & Brown* was put down and was properly stated as a debt, and that they were properly described as creditors and the amount of their debt also properly described.

My Lords, I can only say that such is plainly not the meaning

of the Act. It is clear that it was intended to provide that such registration would put some things right, but it cannot be supposed that it would have the effect of saying that a creditor whose name and address and the amount of whose debt was not put down or described at all, had been properly put down. It might perhaps cure inaccuracies in the description, but to say that it means, where a creditor was not described at all, nor the amount of his debt described at all, that as soon as the resolutions are registered they are to be taken as conclusive of his having been described and the amount of his debt stated, would be putting a construction upon the Act which it is, to my mind, quite impossible to put.

After this, however, coming to the next thing that happens, we find that Mr. *Brown* did not, as he might have done, remain at home and not attend the meetings of creditors at all; he did come, and he there made oath that the amount of debt put against his name was wrong and instead of its being £462, he says that "*Louis Breslauer* is justly and truly indebted to me in the sum of £942 11*s.* 1*d.* for money lent and advanced by me to the said *Louis Breslauer*," and then he gives an estimate of the debt and of the securities which, he says, were to be deducted from it in order to arrive at the £942 11*s.* 1*d.*, and that sum seems to have been agreed to by all parties, and the composition was paid upon it, by the trustee who was paying it upon all the debts, for Mr. *Louis Breslauer*. A sum of £94 5*s.* 2*d.* was paid to Mr. *Arthur Brown*, who gave a receipt for it, that being the amount of the composition upon £942 11*s.* 1*d.*

Before going farther, I merely wish to point out that this sum of £942 described here cannot be said, any more than the description of the £462 put down before, to have included in it a description of the contingent liability to which Mr. *Wilson* and Mr. *Arthur Brown* were subject. It seems to me if that had been done, which, perhaps, in strictness ought to have been done when the proof for that amount was agreed to, if they had amended and rectified Mr. *Breslauer's* statement and made him put in £942 odd for money lent, as being the amount due to *Arthur Brown*, I do not think it would have brought in this contingent liability to *Wilson* and *Brown*, into the statement, a bit more than the £462. I wish to point out that, because I think that is material.

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Now, my Lords, the learned Judges in the Common Pleas Division relied upon the case of *Campbell* v. *Im Thurn* (1), upon which I shall have a word to say presently, and they thought that the principle of the decision in that case applied to the present case. I am of opinion that *Campbell* v. *Im Thurn* (1) was quite rightly decided, though, with all deference to the learned Judges who decided it, I do not think the decision was quite supportable for the reasons which appear to have been given for the judgment in the Court of Common Pleas; still, I think that the judgment was right in itself. I will mention presently what I think was really the point which came to be decided in that case. The Common Pleas Division, as I said before, and Lord Justice *Brett* in the Court of Appeal, thought that, in principle, the case of *Campbell* v. *Im Thurn* (1) was undistinguishable from the present case. The majority of the Court of Appeal, however, thought that the principle in *Campbell* v. *Im Thurn* (1) did not apply here; and Lord Justice *Bramwell* stated, as his idea of the principle upon which *Campbell* v. *Im Thurn* (1) was decided, a ground upon which I will presently remark.

My Lords, I must say, with all deference to Lord Justice *Bramwell*, that what he referred to was not a ground on which *Campbell* v. *Im Thurn* (1) could be supported. I agree with him in thinking that the present case is distinguishable from *Campbell* v. *Im Thurn* (1), but not for the reasons which he gives for that result. I am obliged, in stating my reasons for the advice which I now give your Lordships, to state that I do not agree with the reasons of those learned Judges. I do not come to that conclusion lightly; and I would not state that I differed from them unless I thought it was necessary for the decision of the case.

I will now, my Lords, proceed to state what I think to be the point in the present case. First of all, when it is a regular bankruptcy, what is called a pure bankruptcy—that is to say, where the bankrupt has become regularly a bankrupt—the 31st section, in very wide and extensive terms, says, that all liabilities are to be proveable, and that "liability" shall include everything "capable of resulting in the payment of money or money's worth, whether such payment be, as respects amount, fixed or unliqui-

(1) 1 C. P. D. 267.

dated—as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." Those very wide and extensive words would, I think, cover this possible liability depending upon a double contingency, the two contingencies being that the judgment might be given against the *Ringdove*, and that the amount of the judgment might be greater than the amount of the securities which Messrs. *Wilson* and *Brown* held in their hands. I should say that this liability came within that section. But the Legislature was aware that there might be very great difficulty in making an estimate of such a contingent liability, and whilst requiring that it should be estimated by the trustee in the first instance, it allowed an appeal to the Court against the estimate, and it provided ultimately that if the Court came to the conclusion that the liability was incapable of being fairly estimated, the Court was so to declare it, and in that case that liability would not be a proveable debt. That machinery is provided in the case of an actual bankruptcy, and, for anything I know to the contrary here, if an actual bankruptcy had taken place pending the action in the Court of Admiralty and before the learned Judge had come to his conclusion, the Court of Bankruptcy, if the question had come before it, might have said, "We do not think that this liability can be ascertained or fairly estimated at all; the amount of it is not a matter of opinion, it is pure guess-work, and therefore this is not proveable at all."

Now if this had been a regular bankruptcy, and if they had so said, and *Breslauer* had obtained his discharge, he would still have been liable in respect of this amount; it would have been a debt which was not barred by the discharge. This, however, was not a regular bankruptcy; if it had been, there would have been an order of discharge, and these questions might then have arisen—whether, if *Arthur Brown*, instead of coming in and trying to prove his claim in respect of this liability, and to get an estimate of it, and failing therein, by the Court deciding that the liability was not capable of being proved or being estimated, or whether, if instead of doing that, he had waited until the order of discharge had been given, he could have set up the case that the Court

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ought to have come to the conclusion that it was not capable of being valued, or whether, having allowed his opportunity of raising that question to pass by, he would have been finally and conclusively bound by the order of discharge. These are questions which do not arise here, and probably never will arise. I do not wish to prejudge them. I only say that I think he would have had very great difficulty indeed in raising such a claim after having so missed his opportunity.

So much, my Lords, upon what would have been the position of things if there had been an order of discharge. But Mr. *Williams*, to whom I think the House is very greatly indebted for the clear way in which he brought out the various matters not quite clear in themselves, pointed out, I think quite correctly, that Lord Justice *Brett* made a slip in what he said in the Court of Appeal as to an order of discharge. Lord Justice *Brett* treats it as if there was an order of discharge in this case (1). He treats it as if, in the case of a composition under the 126th section in part 7 of the *Bankruptcy Act*, there was to be an order of discharge given, and he treats it as if it was merely a question of time—as if we were now to consider that Mr. *Breslauer* has got such an order of discharge from all debts provable under the bankruptcy, as he would have had if the case had been a case of a regular bankruptcy. But Mr. *Williams* I think was perfectly right in saying that that was a mistake, and that although where there has been a simple bankruptcy there is such an order of discharge, that is not so under section 126 in part 7. What is substituted for it, is that the creditors may come to an extraordinary resolution, and that "The provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shewn in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors." That is a very different thing from an order of discharge; we have to see what would be the effect of it.

Now had *Brown* not come in and proved for his £942, and rectified the proof to that amount, could it have been said here

(1) *Wilson & Brown* v. *Breslauer*, 2 C. P. D. at p. 335.

that he was bound by the resolution in respect of the contingent liability? It is to my mind perfectly clear that he could not. It is to my mind perfectly clear that he and Mr. *Wilson* jointly in respect of this contingent liability never were, according to any sense of that word "liability," creditors, the amount of whose debt in respect of that liability was shewn in the statement of the debtor. Whether the debtor could have shewn this amount in the statement, or not, is another matter. If it was impossible to put an estimate upon it, and the amount could not be shewn in any way, then it is clear enough that the resolution would not bind in respect of it at all. If, although very difficult, it was not impossible to put an estimate upon it, the scheme of the Act throws the burden upon the debtor who seeks to enter into a composition with his creditors to state that amount.

I do not myself see why the debtor in this case might not have put down "contingent liability to Messrs. *Wilson* and *Brown*, inasmuch as they have entered into this bail bond in the Court of Admiralty at my request, which I estimate at £100," or any other sum that he thought fair and proper. If he had done that, and if no one had objected to it, it would have stood; and then, after the resolution was adopted, it would have been binding upon everybody. If Mr. *Brown* and Mr. *Wilson*, or either of them, had chosen to come in upon that, and had said, You have estimated the contingent liability at £100, but I say you should estimate it at £1000, they would, either of them, have been perfectly at liberty to do so. And if any other creditor had said to Mr. *Breslauer*; You have put it down at £100, and Mr. *Brown* and Mr. *Wilson* have put it down at £1000, but I say the value of it is neither the one nor the other, it should be only a farthing, and consequently they are not at liberty to prove or vote, he might have done so. What would have happened if there had been a dispute of that kind I cannot tell. It may be that the parties would have gone to the Court according to the 10th clause at the end of the 126th section, which says, "If it appear to the Court, on satisfactory evidence, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may adjudge the debtor a bankrupt, and proceedings

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may be had accordingly." I think it far from impossible that the result might have been, that, if they had gone on with the supposed dispute the Court of Bankruptcy would have said, "If we wait until the Admiralty suit is at an end and the contingency is settled, it will be undue delay; if we attempt now to fix an amount upon this contingency, it may be that we may be doing injustice—we shall therefore do neither the one nor the other, but we shall simply adjudge *Breslauer* a bankrupt." However, my Lords, that question does not at all arise in this case.

Now, my Lords, I have to consider whether the case of *Campbell* v. *Im Thurn* (1) is distinguishable from the present. I have already said that I think that case was rightly decided; but we must see what the reason of it is. What Lord Justice *Brett* says on the subject has been already read, and I need not read it again. In the case of *Ex parte Carew* (2) Lord Justice *Mellish* had occasion to give the judgment, and said (3): "It is therefore necessary to decide first, whether any creditor of a compounding debtor who is not bound by the composition, on account of his name, address, and the amount of his debt not having been properly entered, may nevertheless, if he is so minded, take advantage of the composition." Counsel at your Lordships' Bar argued that this was a mere *obiter dictum*. I can only say that Lord Justice *Mellish* clearly did not think so, for he said: "It is necessary to decide" it. He then proceeds to say what I think is perfectly right. "I am of opinion that this clause in the 126th section, which says that a composition shall only be binding on those creditors whose names and addresses, and amounts of the debts are shewn in the statement of the debtor, is put in for the benefit of the creditors, for the purpose of compelling the debtor to give an accurate description of the names of his creditors and the amounts of their debts, but was not put in for the benefit of the debtor, so as to enable him to leave out any particular creditor whom he might please, either on purpose or by mistake, so as to deprive those creditors, if they should think it for their advantage, to come in under the composition. Therefore, when a subsequent clause says, 'The provisions of any composition made in pursuance of this

(1) 1 C. P. D. 267. (2) Law Rep. 10 Ch. Ap. 308.
(3) Law Rep. 10 Ch. Ap. 313.

section may be enforced by the Court on a motion made in a summary manner by any person interested, and any disobedience of the order of the Court made on such motion shall be deemed to be a contempt of Court,' I am of opinion that an application might be made under that enactment, not only by a creditor who is bound because his name, address, and the amount of his debt had been properly entered in the statement, but by any creditor of the debtor who would, in case of his being made a bankrupt, or in case of a liquidation, have been entitled to prove his debt."

I think, my Lords, that that is perfectly correct. I think it is a condition for the benefit of creditors. I think that a creditor may waive it. I think that by waiving it he subjects himself to the jurisdiction of the Court of Bankruptcy; but not because he is an assenting creditor, for I take it that that would be quite immaterial. I take it that if a man came in during the proceedings and said, I claim to prove for £1000 which has been left out of the list; and if his proof was admitted and then he used his power to vote against the composition, being an absolutely dissenting creditor, waiving the condition for his benefit for the very purpose of opposing the resolution, nevertheless if the resolution was carried by the statutory majority, he would be bound by it. Having waived the condition once he would have waived it altogether, and he would be bound as Lord Justice *Mellish* determined. He would have subjected himself to the jurisdiction of the Court of Bankruptcy, which might, in a summary manner, prevent his suing for the debt if he was offered the composition; and that, not because he was a consenting creditor, but because he had become a party to the proceedings and consented to the jurisdiction of the Court of Bankruptcy.

Now, my Lords, there would be no difficulty in such a case in the Court of Bankruptcy amending the statement of the bankrupt, and in this case making the debt put down in the statement to Mr. *Arthur Brown* £942 odd, instead of £462 odd, and if the statement had been thus amended, there could be no doubt at all that if Mr. *Brown* had sued for the £942 odd, he would have been at law bound. In *Campbell* v. *Im Thurn* (1), the Court of Bank-

(1) 1 C. P. D. 267.

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ruptcy had not done that. The statement had not been amended in that case; neither has it been done here. The Court of Bankruptcy, according to the decision of Lord Justice *Mellish*, which I think is perfectly right, had summary jurisdiction to stop the suit in *Campbell* v. *Im Thurn* (1), but the statement had not yet been amended, and the question really before the Court of Common Pleas in *Campbell* v. *Im Thurn* (1) was; Is that fatal? Must a Court of Law say, we are bound, since that statement has not yet been amended, to give judgment for the Plaintiff, and the Defendant must step across to the Court of Bankruptcy and obtain an amendment and an injunction against the Plaintiff? or, were they entitled to say, we consider this, which ought to have been done, as if it had been done; and now that we are a Court both of equity and law, we will treat that as a complete defence? That, my Lords, I think was the real point.

I do not wish, speaking here in the House of Lords, to prejudge, or to express an opinion upon, any matter which is not necessary for the decision of this case; and, therefore, I do not say, and I do not think it likely that the Court of Appeal will ever have to say, whether it was necessary for the Court of Common Pleas to give judgment for the Plaintiff, leaving the Defendant to go and obtain an injunction from the Court of Bankruptcy, or, whether they might, as the Common Pleas Division did, give judgment for the Defendant. I am inclined to think that what the Common Pleas Division actually did was quite right, but they did it, as I said before, not upon what I think was the right ground. In sect. 126 nothing is said in so many words as to a distinction, and I do not think there is a distinction, made between assenting and non-assenting creditors. When the resolution has passed, it is binding as much, and no more, upon those who came in and assented as upon those who came in and opposed; and it is binding as much and no more, upon those who came in and assented as upon those who stayed away. In no one of these cases is there any distinction between those who assented and those who dissented. But there is a difference, and a very grave one, between those who came in, or who accepted a composition, and so in their own favour waived the conditions, and put themselves under the jurisdiction of the

(1) 1 C. P. D. 267.

Court of Bankruptcy, and those who did not so waive it. That is a very important difference and distinction.

Now, my Lords, in the present case Lord Justice *Bramwell* seems to have thought and said in his judgment that the ground upon which *Campbell* v. *Im Thurn* (1) was decided was this, that all who voted upon the question of the acceptance of the composition did thereby enter into an agreement at common law; that they agreed to the composition amongst themselves, that it was a mutual bargain. I can only say that I think that such a supposition is absolutely contrary to the fact. I do not think that a creditor who comes in and votes for a resolution for a composition, dreams that he is entering into a bargain. A creditor who comes in and uses his power to vote against such a resolution most clearly makes no bargain. In either case I think he has waived the conditions, and submitted to the Court of Bankruptcy; and in either case, therefore, I think, subject to the technical point which I have before mentioned, *Campbell* v. *Im Thurn* (1) was rightly decided.

But then, my Lords, if what I have said is the ground upon which the decision in *Campbell* v. *Im Thurn* (1) is to be supported, and I think it is, it seems to me to be clear that it is undistinguishable from the present case. What position is Mr. *Brown* in? He has come in and said, The amount of my debt was described as £462 odd for money lent; it is actually £942 as it is now put; the amount of my debt has been misdescribed, but I waive that, and I come in and say, I submit to the Court of Bankruptcy as regards the debt of £942; and he takes the composition upon that sum, which was a farther waiver as regards that debt. Upon what principle or reason is it to be said that, because Mr. *Brown* waived the condition in his favour as to the £942, therefore he is to be taken to have waived the condition in his favour as to this his contingent liability, of which there is no mention whatever in the statement, which the debtor did not put down, and which the creditor did not claim for? I see no reason why that should be.

If there was any case at all as to its being kept back with a fraudulent intent, or if there was anything upon which it could

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be said that there was a fraud upon the Bankruptcy Law, or as regards the composition with the other creditors, that there was a fraudulent getting of some advantage to himself, there might have been a difference arising from such a state of things. But no such defence has been raised here, and I do not believe that it exists. I have very little doubt that, if we could get at the truth, it would be found to be, that, Mr. *Breslauer* thought either that this contingent debt was no debt at all, from the extreme difficulty of valuing it, which I have already said may or may not be the case, or, as is perhaps equally likely, he thought that he was so certain to succeed in his suit in the *Ringdove* case, that there would never be a farthing due upon the liability, and that, therefore, it was not worth valuing, and it would very likely be found that *Brown* and *Wilson* thought the same if they thought of it at all. However that may be, nothing was done, as far as I can see, by either the one party or the other, which, as regards this debt, could amount to a waiver of the necessity of stating the amount of the contingent liability.

Now, my Lords, to come back to the composition, there is not, as I said before—I think Mr. *Williams* pointed it out—an order of discharge given the debtor at all. If this debt could not be ascertained, and, therefore, could not be proved, if that was impossible, the debtor of course could not put it in his statement, and it would not be within the composition. If it was practicable to put an estimate upon it, the frame of the Act laid the burden upon the debtor of doing so; but he has not done so. If he could not do it he is not discharged. If he could do it he has not done it, and is not discharged. Either way, it is quite clear to my mind that the defence fails, unless he could make out a waiver, which, as I have already said, I think the decision in *Campbell* v. *Im Thurn* (1) shews that he might, if the waiver was applicable to this debt. But upon the facts he cannot make out a waiver at all in respect of the contingent liability, which never was thought of, and as to which the condition never was waived, and which, being a joint and several contingent liability, to Messrs. *Wilson & Brown*, clearly could never in any possible sense be described as a debt due to *Brown* only. It is upon these grounds, and for

(1) 1 C. P. D. 267.

these reasons, that I think that the judgment of the majority of the Court of Appeal was right, and should be affirmed, and the appeal dismissed with costs.

LORD GORDON, after referring to the circumstances of the case, and the various opinions which had been expressed upon it, said :—

From the conflicting opinions in this case, your Lordships will see that it is one which gives rise to considerable perplexity as to the way in which it should be disposed of. My own feeling would be in favour of a different view than that which has been expressed by your Lordships.

My Lords, it occurs to me that there is a very important principle involved in this case, and that its decision will materially affect the law of bankruptcy. As I understand it, the purpose of the Bankruptcy Acts is to provide for the distribution of the assets of bankrupts among their creditors, and to discharge them of all the debts and obligations incurred by them prior to the date of the bankruptcy. If I am right in this, it seems to me that it would be against the spirit and purpose of the Bankruptcy Acts, to hold that the creditor in the debt now sued for was to be entitled to a preference over all the other creditors of the bankrupt, and to receive 20*s.* in the pound on his debt, while the other creditors had to be content with 2*s.* If there had been any fraud averred against the parties, the case would undoubtedly have been different, but here there is no allegation of fraud. The debt seems to have been overlooked both by the debtor and the creditor—probably on the supposition that no claim would arise out of the bail-bond which the creditor had signed for behoof of the debtor. But the creditor *knew* that he had come under an obligation for the debtor, and it must be assumed that he knew he might be called upon to pay something in virtue of that obligation. It was a contingent claim which might arise, and which he was entitled under the Bankruptcy Act to prove against his debtor. If any difference had arisen as to the true value of the debt, there is machinery in the Act for having that fixed, and I think your Lordships have assumed that there might have been a valuation under the provisions of the *Bankruptcy Act* of 1869.

It is not said that the debtor has been discharged in the present

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case, or that the proceedings under the composition arrangement have been closed. If they have not been closed I assume that it is still open for the Respondent to prove his debt, and to receive payment of the composition thereon. But whether this be competent or not, the Appellant does not dispute his liability for payment of the composition on the amount of the claim. And I think it would be unjust to the debtor, and would be giving a preference to the creditor to which he is not entitled, if it were to be held that his failure to claim on a debt, which he was entitled to claim, put him in the position of drawing full payment for it—I think this would open a door to very questionable proceedings, and no debtor could know that he might not be called on, long after he had obtained his discharge, for payment of debts, or relief of obligations incurred by him before the date of his bankruptcy, and one of the main purposes of the law of bankruptcy would thus be frustrated.

I do not consider that there would be any advantage in going into an examination of the decisions which have been so fully canvassed and examined by the noble and learned Lord opposite (Lord *Blackburn*). I confine my observations to the principle, upon which I venture to suggest a doubt upon the view now taken of the case.

Order appealed from affirmed; and appeal dismissed, with costs.

Lords' Journals, April 1, 1878.

Solicitors for the Appellant: *Crook & Smith.*
Solicitors for the Respondent: *Lowless & Co.*

[HOUSE OF LORDS.]

RICHARD WHEELER DOHERTY . . . APPELLANT;

AND

JAMES CLAGSTON ALLMAN AND W. C. DOWDEN . . . . . } RESPONDENTS.

H. L. (I.) 1878 *March* 29; *April* 1, 2.

Injunction—Long Lease for Years—Waste.

The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the Court, and in exercising that discretion a Court of Equity will consider, among other things, whether the doing of the thing sought to be restrained must produce an injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages must be sought in successive suits, or could be obtained once for all.

Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry, for rent in arrear and no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his executors, &c., will "during the term hereby granted preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end or sooner determination of this demise, shall and will so leave and deliver up the same unto," the lessor, his heirs, &c. The premises had been used as corn stores for some years; and afterwards as artillery barracks, and dwellings for married soldiers. They had fallen into disrepair: it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—

Held, that this was not the case of enforcing a negative covenant where the words of contract were clear and indisputable; that the waste alleged was meliorating waste, and that, under the circumstances, the Court below had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction.

APPEAL against an order of the Court of Appeal in *Ireland* which had reversed a decree of the Vice-Chancellor of *Ireland*, made on the 4th of July, 1876, in a cause in which Mr. *Doherty* was the Plaintiff, and the two Respondents were Defendants.

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The Plaintiff had filed a bill against the Defendants complaining of certain acts of waste which he alleged they had committed on lands and buildings of which they were lessees, and he was the landlord and the reversioner, and praying for a perpetual injunction to restrain them from such waste in future. The facts out of which the suit arose were these:—

By an indenture of release of the 10th of May, 1762, *John Bernard* granted to *George Sealy*, his heirs and assigns, for ever, two fields, part of the lands of *East Gully*, in the county of *Cork*, at a yearly rent of £10. The fields were situated on a rising ground near the town of *Bandon*, and on them there had been erected some large buildings which had been used as store warehouses, and afterwards as artillery barracks, and dwellings for married soldiers.

On the 18th of October, 1798, *Baldwin Sealy*, in whom the grantee's interest was then vested, demised part of the premises to one *Arminger Sealy*, to hold the same from the 29th of September then last past, for a term of 999 years, at the same yearly rent of £10. The lease contained a covenant by *Arminger Sealy*, the lessee, for himself, his executors, administrators, and assigns, during the said demise to "preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition, and at the end or sooner determination of the said demise so to leave and yield up the same to the said *Baldwin Sealy*, his heirs, executors, administrators, and assigns." The store, which was the particular subject of this lease was known by the name of "the northern," or "the larger store."

On the 29th of November, 1824, *Robert Sealy*, in whom the interest under the grant of 1762 had become vested, demised another part of the fields there to *Thomas Beamish* and *Henry Heazle*, describing them as premises then lately held by *John Swete*, Esq., formerly the artillery barracks, situate at *Bandon*, to hold the same for the term of 988 years, at the yearly rent of £32 10*s*. The same covenant to "preserve, uphold, support, maintain, and keep the premises and all houses, offices, and improvements made and to be made thereon, in good and sufficient repair, order, and condition," was inserted in this lease, which also bound the tenant to yield up

the premises to *Robert Sealy*, "his heirs, executors, administrators, and assigns, in stiff, staunch, and tenantable order, repair, and condition." The store which was the especial subject of this lease was called "the southern," or "smaller store."

All these premises were subsequently conveyed to the Appellant, his heirs and assigns, for ever. He resided at *Oakville* in their immediate neighbourhood, and the buildings were visible from his house.

Through various underleases and assignments the Respondents became the lessees of the whole of the premises comprised in the lease of October, 1798. The premises were described in the lease under which they claimed, a lease for 750 years at the yearly rent of £46 8*s.* 1*d.*, as "A large storehouse and kiln, now in the possession of *John Hurley*, also the several dwelling-houses and outhouses, and yard, back and adjoining said storehouse and kiln, now partly in the possession of *John Swete* and his undertenant, being part of *East Gully*, situate at *Gallows Hill*, in the town of *Bandon*, subject nevertheless to the several agreements made by the said *John Swete* with his several undertenants occupying the same, he, the said *John Hurley*, having agreed to take with said tenants, and to receive the said respective rents payable by them out of said premises." The boundaries of the premises demised by the lease of the 23rd of December, 1835, were thus stated: "Bounded on the east by *Gallows Hill*, and on the south and west by Messrs. *Beamish & Heazle's* storehouses and fields." There was in this lease the same covenant to "maintain and keep the demised premises and improvements, &c., in as good repair and condition," and so to yield them up.

During the war which ended in 1815, and for some years afterwards, these buildings had been used for the accommodation of artillery soldiers, but they were for some time unoccupied, and were said to be falling into decay.

The Respondents proposed to change many of these stores into dwelling-houses, and published advertisements for plans and specifications. After due notice of his objection to such a proceeding, the Appellant filed his bill praying for an injunction to restrain, &c., alleging objections to the proposed alterations on account of the proximity of the projected houses to his private residence.

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Much evidence was given by the Respondent to shew that the alterations proposed to be made in the buildings would considerably increase their value.

The cause was heard on the 4th of July, 1876, before the Vice-Chancellor of *Ireland*, who, expressing an opinion that this was a case in the nature of structural alteration of the premises, thought himself bound to treat it as waste, impairing the evidence of title, and therefore granted a perpetual injunction to restrain it. On appeal, the Lord Chancellor of *Ireland* and Lord Justice *Christian* directed the injunction to be dissolved, without prejudice to the right of the Plaintiff to proceed, if so advised, at law (1).

This appeal was then brought.

Mr. *Kay*, Q.C., and Mr. *Jackson*, Q.C. (of the Irish Bar) (Mr. *J. D. Robinson* (also of the Irish Bar), was with them) for the Appellant:—

The decision of the Vice-Chancellor proceeded upon well-established principles of the Courts of Equity, while that of the Court of Appeal disregarded them, and could not be supported. Structural alteration, which is proposed to be effected here, has always been treated as waste which was to be restrained by injunction: *Bonnett* v. *Sadler* (2); a rule fully adopted in *Ireland: Elliott* v. *Watkins* (3); *Maddock* v. *Mallet* (4); and though there may be a covenant to repair and to surrender in good condition at the end of the term, yet, if the destruction of the premises is threatened within the term, the landlord would not be left to assert his claim to damages at law, but the Court of Equity would interfere by injunction to prevent the threatened destruction: *The Mayor of London* v. *Hedger* (5). It would be dangerous to adopt a different practice. Damages, at law, might not always afford a sufficient remedy, and Equity would therefore interfere to prevent a mischief for which damages might never give a satisfactory compensation. If the nature of the thing is altered, the evidence of its identity is destroyed, and that is waste: *Cole* v. *Forth* (6); and that is the rule even where the alteration is intended and effected as an

(1) Ir. Rep. 10 Eq. 362–460.
(2) 14 Ves. 526.
(3) 1 Jones, Exc. 308.
(4) 12 Ir. C. L. Rep. 173.
(5) 18 Ves. 355.
(6) 1 Lev. 308; 1 Mod. 94.

improvement (1); *Greene* v. *Cole* (2); *The City of London* v. *Greyme* (3). Even with relation to a breach of covenant, the mere actual breach of it, where the construction of the contract is clear, and the breach clear, will be met by the grant of an injunction: *Tipping* v. *Eckersley* (4). *Johnson* v. *Hall* (5); *Kemp* v. *Sober* (6); *Hunt* v. *Hodges* (7); *Doe* d. *Wetherell* v. *Bird* (8); *Woolcock* v. *Den* (9), were also cited.

The title to an injunction is clear where the parties stand in the relation of lessor and lessee, but even as between strangers to each other an injunction will be granted to restrain an obstruction of free access of light and air, for the function of a Court of Equity in such a case is prevention: *Leech* v. *Schweder* (10); *Theed* v. *Debenham* (11); *Broder* v. *Saillard* (12).

The principle on which injunctions will be granted in cases like the present is not to be restrained in its operation by the existence of a long lease. It is true that Lord *Redesdale*, in *Calvert* v. *Gason* (13), said that leases with covenants for perpetual renewal were regarded in *Ireland* as perpetuities, but that proposition was not adopted by Lord Chancellor *Sugden* in the subsequent case of *Coppinger* v. *Gubbins*, who observed (14), that it was "a strong thing to say,—when the fee was not granted, but merely a right to have a perpetual interest, dependent upon certain circumstances,—that the lessee should be permitted to exercise rights against the legal import of the instrument under which he claimed." Here the legal import of the instrument was that the tenant would maintain, uphold, and support the buildings and restore them at the end of the term. He could not fulfil that covenant if he altered them throughout, or utterly destroyed them and built others. Where bog, *eo nomine*, was leased for lives renewable for ever, and this lease was afterwards converted into a fee farm grant under the 12 & 13 Vict. c. 105, the grantee on cutting turf for sale

(1) Co. Litt. 53 a.
(2) 2 Wms. Saund. 259, n. (11).
(3) Cro. Jac. 182.
(4) 2 K. & J. 264.
(5) Ibid. 414.
(6) 1 Sim. (N.S.) 517; 20 L. J. Eq. 602.
(7) 1 Ir. Jur. 33.
(8) 6 C. & P. 195.
(9) 1 F. & F. 537.
(10) Law Rep. 9 Ch. Ap. 463.
(11) 2 Ch. D. 165.
(12) Ibid. 692.
(13) 2 Sch. & Lef. 561.
(14) 3 J. & Lat. 397 at 411.

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was held impeachable of waste: *Gore* v. *O'Grady* (1). It was to prevent such a course of conduct that this injunction was applied for.

It had been decided that where a landlord objected to a change of this sort, even though the change was alleged to be an improvement, the landlord had a right to enforce his objection by injunction, for it was his right, and not the tenant's taste or fancy, that was to be considered in such a matter: *Smyth* v. *Carter* (2), where the Master of the Rolls said, "The landlord has a right to exercise his own judgment and caprice whether there shall be any change." The covenant to maintain and restore really expressed that idea, and where that covenant was broken the Court was bound to interfere by injunction.

Lord Darcy v. *Askwith* (3), *Courtown* v. *Ward* (4), *The City of London* v. *Pugh* (5), *Doe* d. *Grubb* v. *Earl of Burlington* (6), and *Jackson* v. *The Duke of Newcastle* (7), were cited and commented on.

Mr. *Davey*, Q.C., and Mr. *Dauney* (Mr. *O'Hea* (of the Irish Bar) was with them), for the Respondent:—

There is not a pretence for saying that what is proposed to be done here is waste, or, if that word must be employed, then it is what has been called "meliorating waste," and no ground exists for granting an injunction against it. In the case of the *Governors of Harrow School* v. *Alderton* (8), where an action of waste was brought and the jury gave but one farthing damages, the Court of Common Pleas, then presided over by Lord *Eldon*, gave the Defendant leave to enter up the judgment as a judgment for himself. And in the subsequent case of *Barry* v. *Barry* (9) Lord *Eldon*, adopting and applying the same principle, refused an injunction to stay what he deemed to be only trivial waste.

The law will not allow that to be treated as waste which is really of benefit to the inheritance: *Barrett* v. *Barrett* (10). That

(1) 1 Ir. Rep. C. L. 1.
(2) 18 Beav. 78.
(3) Hob. 234.
(4) 1 Sch. & Lef. 8; see *Elias* v. *Griffiths*, 8 Ch. D. 521.
(5) 4 Bro. P. C. 395.
(6) 5 B. & A. 547.
(7) 3 De G. J. & S. 275.
(8) 2 Bos. & P. 86.
(9) 1 Jac. & W. 651.
(10) Hetley, 35.

doctrine was well explained by the Master of the Rolls in *Jones* v. *Chappell* (1).

The observations of Lord Chancellor *Sugden* in *Coppinger* v. *Gubbins* (2) are really, when properly considered, strong for the Respondent, for after the words already quoted, which merely questioned whether a long lease was a conclusive answer to a charge of waste, he went on to say that the Court would not interfere by injunction where the landlord made an improper use of his right, as, for instance, where the alleged waste was in truth meliorating waste.

And what was said by the Master of the Rolls in *Smyth* v. *Carter* (3) either was a mere *dictum* not applicable to a case like the present, or it simply expressed his opinion that the Court would exercise its jurisdiction in a stricter manner in the case of a tenant from year to year than in the case of one who held for a longer term, but he never could have meant that the mere caprice of the landlord was to be taken as the rule on which the jurisdiction of the Court of Equity was to be founded. Here the alleged waste is really meliorating waste; there is nothing but the caprice of the landlord, which objects to what is proposed, and what will really make the property much more valuable, and give greater effect to the only right of re-entry named in the lease, namely, that which is to arise on the non-payment of rent.

Then as to the covenant, the words must be taken with reference to the subject-matter, and never could have been intended to mean that at the end of more than 900 years the tenant would surrender the buildings exactly in their original condition, having so maintained them all that time, or would restore them to that condition in order to surrender them. The intention was to bind the tenant to keep them in as good a state as they were in when they were demised, and that was the view taken of the words in both the Courts below, the Lord Chancellor even saying that there was a mere ordinary covenant to keep in repair; and the Vice-Chancellor being influenced in his judgment solely by the idea that there was a technical necessity for interfering where the alteration proposed was structural. Here, too, the principle acted on in the case of the *Duke of Bedford* v. *The Trustees of the British*

(1) Law Rep. 20 Eq. 539. (2) 3 J. & Lat. 397.
(3) 18 Beav. 78.

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Museum (1) applied, there having been a complete change in the condition of the premises and the uses to which they were put.

As to the grant of the injunction, *Lumley* v. *Wagner* (2) shews that the Court will not by injunction attempt to enforce an affirmative covenant, though it will restrain the breach of a negative covenant, but at all events the Court will not attempt to enforce anything which is not found in the covenant: *Kemp* v. *Sober* (3). The granting of an injunction is an act depending on the discretion of the Court, a discretion to be exercised with regard to all the circumstances of the case—the covenants entered into by the parties, their relative interests, the length of the demise, the nature of the property, and the sort of alterations proposed to be made in it. In this case, all these things being considered, there could be no doubt that the real purpose of the covenant, that of preserving and improving the property, would be secured, and not defeated, by what the Respondent proposed to do; that in fact he would make the property much more valuable than before, and gave in that way a better security for the payment of the rent, and benefit, and not injure, the reversioner. Under these circumstances, the idea that the "capricious" will of the reversioner of a term of 900 years was to be allowed to prevent all intermediate improvement of the property could not be sustained.

There was no pretence for saying that there was intended such a structural alteration of the property as would injure it, so as to destroy, or even affect the evidence of title. The identity of the property was easily ascertained and fixed, the metes and bounds were all known and carefully preserved, and therefore not even upon that technical ground was there any reason for interfering with the proposed works by which the Respondent intended to convert a not very valuable property into one of a really profitable kind.

Mr. *Kay* replied.

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THE LORD CHANCELLOR (Lord *Cairns*):—

The question in this case arises upon two leases which are now vested in the Respondent. One of them is dated in the year

(1) 2 My. & K. 552. (2) 1 De G. M. & G. 604.
(3) 1 Sim. (N.S.) 517.

1798, and is for the long term of 999 years; the other was granted in 1824, and is for the term of 988 years; the first being at the rent of £10, and the second at a rent of £32 19*s*. The reversion to both these leases is vested in the present Appellant.

The property demised is thus described:—[His Lordship read the description of the premises contained in each lease, and also the words of the covenant in each: see *ante,* pp. 710, 711.]

There is not in either of these leases any power of entry for breach of covenant, but there is a power that if rent was not duly paid and no sufficient distress found on the premises to satisfy the arrears, it should be lawful to the lessor to re-enter and re-possess himself of his former estate.

That is the substance of the two leases. The property demised, so far as it consisted of buildings, was in the form of stores—and, as we understand, stores for storing corn. It is stated in evidence, and does not appear to be a matter of controversy between the parties, that since the date of these leases a considerable change has occurred with reference to the demand for buildings of this description in the neighbourhood of *Bandon;* and it is stated, and does not appear to be seriously controverted, that in the town of *Bandon,* which seems to lie at a lower level than where these stores are built, there is now a considerable—perhaps an exuberant--supply of store buildings, access to which, or facility of carriage, is greater than to this higher ground, and that, therefore, there is serious difficulty in obtaining a tenant for this property used as stores. Under these circumstances the Respondent has had specifications prepared, which appear to be prepared in a careful, proper, and business-like way, and he has had a contract made in accordance with those specifications, by which the external walls of this building are to be retained, and those external walls, where one part of the building is of a lower height than the rest, are to be raised, so that the building may be of a uniform height; internal changes are to be made, internal party walls are to be introduced, the flooring is to be altered in its level, and six dwelling-houses are to be made out of this which now is one long store. Your Lordships have before you a photograph of the building as it now appears, and an elevation of the building as it is proposed to be, has also been put in

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evidence; and certainly it does appear a strange thing to any spectator that it should ever come to be a matter of grave dispute between two rational men as to whether that which was proposed to be done is not almost as great an improvement as could be effected. However, so it is, and with that state of things your Lordships have to deal.

The Appellant objects to this being done. The owner of the reversion subject to this long term of years objects to that which the holder of the lease proposes to do. He objects upon two grounds. He says, first, that what is proposed to be done is waste; and, secondly, that it is a breach of contract. I will invert the two grounds, because undoubtedly, if there is a breach of the contract, that is a higher and a stronger ground upon which to appeal to a Court of Equity. If there should be no ground for interposing by reason of a breach of contract, there may still, however, be ground for interposing on the ground of waste, which I will consider afterwards.

My Lords, we will, therefore, first consider the question as to the breach of contract. Your Lordships will observe that the contract is an affirmative one. There are no negative terms in it. There are no terms obliging the lessee negatively, by way of contract, not to use these premises for any purpose but stores, and not to make any alteration which would render them suitable for any purpose but that of storing corn or for goods of the same kind. Your Lordships will also see that the covenant in the first of the two leases is to "preserve, uphold, support, and maintain," not merely the demised premises, but "all improvements made and to be made thereon," and to yield them up; while the covenant in the second lease is to "preserve, uphold, support, and maintain," not only the demised premises, but "all houses, offices, and improvements made and to be made thereon, in good and sufficient order, repair, and condition," and to yield them up. The mention of stores occurs in the parcels in the demising part of the lease. In the one case the building is called "stores," and in the other "store-house," and undoubtedly they were stores and store-houses at the time, and probably they could not be called anything but that which they are called in the lease.

I should not wish to decide or to express an opinion absolutely

upon the construction of this covenant. I am going to give to the Appellant the benefit of any doubt there may be in my mind upon the subject, but I am bound to say there is in my mind very considerable doubt as to the construction of the covenant. I should be sorry to lay down any general rule as to what the word "improvements" meant in a covenant of this kind, but I must take leave to observe that, dealing with property of this description—demised on the tenure which we have here of 999 years or 988 years, bearing in mind that the stores were at the time of the demise to the Respondent, coarse, open, and unfinished buildings, I should be sorry to say that if it came afterwards to be the case that in a place where the stores were absolutely useless buildings, buildings for which a tenant could not be obtained, whereas on the other hand if these stores were, by internal arrangements and fittings converted into dwelling-houses, the property could be made productive and useful—I should be sorry to say that, in a lease for such a term as this, the construction to be given to a covenant of this kind might not be held to be such as that the conversion of the store-house under the circumstances into dwelling-houses would be, or might be an "improvement" within the meaning of that term. The consequences of a different view are to my mind extremely formidable. Without minutely examining the evidence in this particular case, I may say that there might be a case in which a building of this description, in the lapse of a portion of a very long lease of this sort, would become absolutely useless as a store; and I should be sorry to say that it had been so perpetually impressed with the character of a store, that, under a covenant of this kind, it could not be improved so as to be useful for some other purpose. But, my Lords, I repeat I will give the Appellant the benefit of any doubt there may be upon that point; and I will assume in his favour that the construction is that which he contends for, and that this covenant ought to be read literally as a covenant to maintain the stores as stores, and to deliver them up at the end of the term as stores.

Now, my Lords, let us look at it in that point of view. I said that there is here no negative covenant—not to turn these buildings to any other use. My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court

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of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves. But, my Lords, if there be not a negative covenant but only an affirmative covenant, it appears to me that the case admits of a very different construction. I entirely admit that an affirmative covenant may be of such a character that a Court of Equity, although it cannot enforce affirmatively the performance of the covenant, may, in special cases, interpose to prevent that being done which would be a departure from, and a violation of, the covenant. That is a well-settled and well-known jurisdiction of the Court of Equity. But in that case, my Lords, there appear to me to come in considerations which do not occur in the case of a negative covenant. It may be that a Court of Equity will see that, by interposing in a case of that kind, in place of leaving the parties to their remedy in damages, it would be doing more harm than it could possibly do good, and there are, as we well know, different matters which the Court of Equity will, under those circumstances, take into its view. It will consider for example whether the injury which it is asked to restrain is an injury which if done cannot be remedied. It will consider whether, if done, it can or cannot be sufficiently atoned for by the payment of a sum of money in damages. It will ask also this question,—Suppose the act to be done, would the right to damages for it be decided exhaustively, once and for all, by one action, or would there necessarily be a repetition of actions for the purpose of recovering damages from time to time? Those are matters which a Court of Equity would well look to, and on the other hand a Court of Equity would look to this: If we interfere and say, in aid of this affirmative covenant, that

something shall not be done which would be a departure from it, no doubt we shall succour and help the Plaintiff who comes for our assistance. But shall we do that? Will the effect of our doing that be to cause possible damage to the Defendant, very much greater than any possible advantage we can give to the Plaintiff? Now, in a case of that kind, where there is an amount of discretion which the Court must exercise, those are all considerations which the Court will carefully entertain before it decides how it will exercise its discretion.

My Lords, let us then apply those considerations to the present case. Suppose the change which is contemplated by the Respondent here is made in the internal arrangements of this which is now a store, will the injury be irremediable? Clearly not. Beyond all doubt as regards the immediate effect it would be beneficial and not injurious to the reversioner; he will have a much better security for his rent, and the property undoubtedly will be increased in value, and if, when the lease comes to an end, he should have that predilection which he appears now to have for a building of the character which we see represented in this photograph, it would be merely a question of money, and that not a very large sum of money, in order that the building might be brought back to the state in which it now is. Therefore there would be no injury which would be irremediable. Then will damages be a sufficient compensation? The same answer applies there—an expenditure of a sum of money, of a very moderate amount, as we see from the estimate of even that which is proposed to be done by the Respondents, will bring back the building to the state in which the Appellant wishes it to be. Then, again, will there be a necessity for repeated actions for damages? Certainly not; it will be one payment, and one only, and by that means the lessor will get the whole of his right.

But then, my Lords, let us look at the other side—what would be the effect upon the Respondents of the interposition of the Court? Here is a lease for 999 years, of which 900 years and more are unexpired, and there is a rental on that lease, and on the second lease, amounting together to £42 19*s.* a year. If the evidence is to be believed it is either the case now, or it may become the case, that the premises are absolutely untenantable—

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that no tenant can be obtained for them, or obtained for them at a rent which will produce the rent which the Respondents have to pay. Repair, then, they must, for they are bound to do so by the covenant, and they have been called upon to do so. They must therefore lay out money in repairing something for which they cannot get, when it is done, an equivalent in the shape of a remunerative rent, and the Court therefore for 900 years will be sentencing them, or those who succeed them, to keep the premises in a shape which will not enable them to get a remunerative rent; while, on the other hand, they would be bound to pay the substantial rent of £42 19s. a year to the landlord. It will bear hardly upon the person who stands in the position of the lessee, but it will give no present benefit whatever to the Appellant, and even supposing he should ever become entitled to the lease, anything he would be entitled to would be represented by the payment of an extremely moderate sum of money.

Now, my Lords, that being the case, I do not think it is denied at the Bar that on a covenant of this kind the Court of Chancery before it interferes to prevent what was said to be a departure from the terms of the covenant must exercise its discretion with regard to the whole of the circumstances of the case—it appears to me that what I have said will probably convince your Lordships that there is every reason against the exercise, by the Court of Chancery, of its power of giving an injunction, and everything in favour of its leaving this matter to be the subject of damages, for any person who thinks it worth while to bring an action for damages. My Lords, I therefore think that the case, so far as it is founded on the covenant, is one which, looking upon it as an application for an injunction, entirely fails.

Then with regard to the question of waste: there is no doubt that the Court of Chancery exercises a jurisdiction in restraining waste, and where waste is committed in requiring an account of the waste for the purpose of recompensing the person who has suffered; but I apprehend it is perfectly clear that the Court of Chancery, acting in that case in advance of the common law right, will, in the first place, consider whether there is, or is not, any substantial damage which would accrue, and which is sought to be

prevented, and will make that inquiry. In the present case it appears to me to be extremely doubtful whether any jury could be found, who, after this work shall be executed in the way that is proposed, would say that any damage had been done by the work to the inheritance. And I doubt, farther, whether it must not be taken as clear from the evidence here that any jury, or any tribunal judging upon the question of fact, would not say that, if there be technically what in the eye of the common law is called waste, still it is that ameliorating waste which has been spoken of in several of the cases cited at the Bar. That which is done if it be technically waste—and here again I will assume in favour of the Appellant that it is technically according to the common law, waste—yet it seems to me to be that ameliorating waste which so far from doing injury to the inheritance, improves the inheritance. Now, there again the course which the Court of Chancery ought undoubtedly to adopt would be to leave those who think they can obtain damages at common law to try what damages they can so obtain. Certainly, I think here again, the Court of Chancery would be doing very great injury to the one side for the purpose of securing to the other, that slightest possible sum which would at common law be considered the full equivalent to which he was entitled. My Lords, this was the view, in substance, taken by the Lord Chancellor of *Ireland* and the Lord Justice of the Court of Appeal, who in this respect differed from the Vice-Chancellor. I must say that I entirely concur with the decision at which they arrived, and therefore I would advise your Lordships, and move your Lordships, to dismiss this appeal with costs.

LORD O'HAGAN:—

My Lords, I am of the same opinion. I have given much attention to the case in the course of the argument, which was certainly very ably conducted from beginning to end, and I have no reason to doubt that your Lordships ought to concur with the view of my noble and learned friend on the woolsack. The first consideration in the case is I think this—and it is one which has not been and could not be disputed at the Bar—that the jurisdiction as to injunctions in cases like the present is a jurisdiction to be exercised according to the discretion of the Court of Equity. Lord *St.*

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Leonards, in the case to which reference has been made, speaks of the true mode of exercising that discretion, manifestly assuming that the discretion exists, and ought to be exercised; and that being so, the question is not whether it should be exercised wildly, indiscreetly, and capriciously, as has been suggested in the course of the argument—at all events against such an exercise a very proper protest has been made—it must be exercised according to settled principles and according to the order and practice of Courts of Equity.

Now we have, I think, established for the purposes of this decision the principles in this case by which we ought to abide. In the case of *Mollineux* v. *Powell* (1), which contains perhaps the clearest dictum we have upon the matter, two conditions as to the exercise of jurisdiction in cases of waste have been very clearly pointed out, and one at least of those conditions is expressly recognised afterwards in the Irish case of *Coppinger* v. *Gubbins* (2). Those conditions are that the waste with which a Court of Equity, or your Lordships acting as a Court of Equity, ought to interfere, should be not ameliorating waste, nor trivial waste. It must be waste of an injurious character—it must be waste of not only an injurious character, but of a substantially injurious character, and if either the waste be really ameliorating waste—that is a proceeding which results in benefit and not in injury—the Court of Equity, and your Lordships acting as a Court of Equity, ought not to interfere to prevent it. I think that is perfectly well established. On the other hand, if the waste be so small as to be indifferent to the one party or the other—if it be, as has been said by a great authority in our law, such a thing as twelvepence worth of waste, a Court of Equity, and your Lordships acting as a Court of Equity, ought not to interfere on account of the triviality of the matter. Now, in my view of the case, those principles decide the question so far as this portion of it is concerned; for it appears to me that we have here established to the full satisfaction of your Lordships, by a series of authorities to which I shall not refer, that the waste, to be of any sort of effect with a view to an injunction, must be a waste resulting in substantial damage. Your Lordships are the Judges not only of the propriety of exercising your dis-

(1) 3 P. Wms. 268, n. (F). (2) 3 J. & Lat. 411.

cretion, but of the facts by which the exercise of that discretion ought to be regulated. Now, with reference in the first place to the materiality of the waste, we have in the analogy of proceedings in the Courts of Law a very important guide for the exercise of our equitable jurisdiction. It is established not only in the case of *The Governors of the Harrow School* v. *Alderton* (1), before Lord *Eldon*, but in every case, that if there be a trial at law, and if the result of such trial is that the jury is compelled to give nominal damages, such as three farthings in that case, the verdict will be entered, not for the man who obtained the nominal damages, but for the Defendant in the case. It is rather an extraordinary jurisdiction, no doubt—it is an equitable jurisdiction exercised by a Court of Law—but it seems to be quite established and quite recognised, and being so I think it is impossible to say that when we come to exercise our jurisdiction, which is a discretionary jurisdiction, we should act upon any other principle, or to say that if we see that the damage has not really been substantial and important, we should do that in a Court of Equity according to our discretion, which even in the strictness of a Court of Common Law is not done because of the reason given.

I think that the judgment in the Court below in the first instance went very much upon the view that the waste here had the effect of destroying the evidence of title. A great deal was said also at the Bar upon that subject, and a great deal certainly was said by the learned Judge who pronounced the original judgment in this case. Now I cannot myself see that there is anything at all in that. I do not think that in the particular circumstances of this case there is any interference with the evidence of title. You may do what you please with this particular building (according to the plans and views of the parties connected with it), and yet not destroy any evidence of title at all. The building is to be modified—is to be improved—but it is to remain where it was, it is to be of the same proportions, it is to have the same position, it is to have the same surroundings; and I cannot see how what is proposed to be done would injure or affect the Appellant's evidence of title. Independently of that, I think we must take this into account, that owing to the circumstances in which property

(1) 2 B. & P. 86.

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is now situated in this country, in *Scotland*, and in *Ireland*, evidence of title of this kind is not at all of the same importance as it was in other times and other circumstances. When you have an Ordnance Survey, when you have a Registry of Deeds, when you have a system of conveyancing, the value as evidence of title, of a place of this sort retaining its particular position, is very sensibly diminished. At all events, I see no reason upon that ground to hold that there has been any diminution of the evidence of title of which the lessor of these premises can properly complain.

We have heard much comment, on the one side and the other, with reference to the length of the term in this case. I do not rely upon that as the only circumstance in the case on which the judgment of the Court of Appeal should be sustained; but when, in a case of this sort, we are asked to exercise our discretionary jurisdiction, it surely is material to see that the interest of the individual who is only to come into possession of the premises at the end of 900 years is infinitesimally small compared with the interest of the man who is the tenant, and who, with his successors, is to hold the premises all that time, upon whom the effect of our exercise of this jurisdiction would be to tie up his hands, to destroy their property, and to inflict great damage upon them during the course of these many centuries that are yet to come. I think, that being so, we have only to say this in addition, that it is scarcely a matter of possible controversy here whether or no this change is a beneficial change. We have most conclusive evidence that the change will be beneficial. We have the most clear evidence that, as the matter stands, this old dilapidated store has become useless, I presume, to any human being. Circumstances have changed; the necessity for a store of that kind has ceased, and the result has been that the store, if it be allowed to continue in its present condition—because the parties are compelled to leave it in its present condition—till the end of this term of 999 years, the whole premises will be utterly valueless; whereas, upon the other side, if you substitute for this store the houses which are contemplated you double, you treble the security of the landlord, and give him, or whoever may live at the end of the term of 999 years, certainly not an injured property but an improved one. Therefore, inas

much as the waste, if waste there be, is ameliorating waste, and the injury to the property produced by the waste is not merely trivial but absolutely non-existent, it appears to me that upon that ground the judgment of the Court below may very fairly be maintained.

Now there was one case, I think it is the only case, referred to by the very able and learned Judge who had this matter first before him, the case before Lord *Romilly* to which reference has been made from time to time, *Smyth* v. *Carter* (1), which would be very strong authority if we are to take it as expressing, in the words that are used, the full opinion of that learned Lord, and an opinion reached with reference to facts which have analogy to the facts before your Lordships. But in the first place, that was a mere *obiter dictum* of Lord *Romilly*. It was in an interlocutory proceeding. It was without any sort of argument; and the case has, I think, no application to the case before your Lordships, and for this important reason, that in that case the observations may have been applied to the limited interest of a tenant from year to year, whereas we have to deal here with the interest of a tenant for 900 years. The circumstances are wholly different, the conditions are wholly unlike, and, therefore, the authority does not, in my opinion apply at all to the case before us.

But beyond all that, if the latter words of the dictum, that the landlord has a right to exercise his own judgment and caprice as to whether there shall be any change, were to be taken in their literal sense, and as applicable to this case, the effect would be to make the landlord absolute arbiter of the fortune, good or ill, of his tenant with reference to these premises for a period of 900 years. Now, my Lords, I for one should be prepared to exercise the jurisdiction of this House, and say that this is not and cannot be the law. Upon this ground I think that the judgment may now well be sustained.

As to the matter of the covenant, my noble and learned friend on the woolsack has dealt with that so largely and so well that I shall not make any observation upon it, except to say that, though it appears to me that it is not necessary to give an opinion upon the construction of that covenant, yet, looking at it in its plain

(1) 18 Beav. 78.

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and simple sense, the word "improvements" inserted in that covenant appears to me large enough to let in a change of this description, and indeed indicates that there existed in the minds of those who entered into that contract at the time, a very reasonable view that, the term being so enormously long, and the changes of the world and of society being such as they necessarily must be during that period, there ought to be a precaution taken so that in the course of these many centuries there might be made, according to circumstances, changes which in themselves would be improvements, according to the exigencies of society and the position of the individuals concerned. Therefore I think that, if it were necessary to decide that question, it would be very difficult to hold that there was a breach of this covenant in that particular regard, and that the word "improvements" might not possibly—I only say that—might not possibly be held to reach a case of this description, where it is proposed to substitute for a tumble-down old store a substantial house or set of houses, from which the tenant would derive a very fair income, and from which the landlord would derive a very much enlarged security. Therefore with reference to the covenant, there being no negative words in it, it appears to me impossible, having regard to the authorities, to say that if the case of the Appellan t fails with reference to the waste, it ought to succeed on the matter of the covenant.

On the whole, I fully concur with my noble and learned friend, that, if there be damage in the case, a Court of Law can deal with that question, and I am quite clear that, our jurisdiction being discretionary, our discretion ought to be exercised in refusing the injunction.

LORD BLACKBURN :—

My Lords, I am of the same opinion. The jurisdiction of the Court of Equity to enforce the specific performance, or to grant an injunction to prevent the breach of a covenant, is no doubt a discretionary jurisdiction, but I perfectly agree with the view expressed by your Lordships that the discretion is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of Equity, but is a discretion to be exercised according to the rules which have been established by a long series of

decisions, and which are now settled to be the proper guide to Judges in Courts of Equity. Without professing to speak definitely as to the every day practice of such Courts, with which I have not always been familiar, I may observe, though with diffidence, that very early in the consideration of this case I came to the conclusion that, in this particular instance, the Judges of Appeal in *Ireland* were quite right in exercising their discretion and refusing to grant the injunction.

I will take the question of the covenant in the contract first. Wherever a consideration of a covenant, and examination into its words and meaning, reveal that the plain intention of the parties was that the lessee might have possession of the land, whatever it may be, on the express bargain that a particular structure was to be kept up, or a particular thing was not to be done, and that the lessor stipulated for that, and the lessee came in and took possession of the premises on the terms that he was to keep that bargain, there, as a general rule, the Court of Equity would not do its duty if it did not enforce the contract, because mere damages would not then afford a sufficient or adequate remedy. A very good instance of it was in the case (1) where it appeared clearly that the landlord of a house for some reason, no matter what, thought it desirable for him that the house should not be used as a ladies school, and accordingly he in express terms in the contract under which he let the house, bargained that it should not be used as a ladies school, and a tenant, or an assignee of the tenant, came in, and occupied the premises under the contract, and yet proceeded to use them as a ladies school. In such a case I say it would have been monstrous if a Court of Equity had for a moment hesitated, and had said that the using of the premises as a ladies school would do the landlord no harm. The answer would be plain, whether the damages were great or little, the very bargain, on which the premises were taken, was that the tenant or his assignees should not use them as a ladies school, and therefore he should of course be prevented from doing so.

I think, however, it would be but seldom that you could have it appear distinctly upon a lease that it was intended that a thing should not be done unless there were negative words used. But

(1) *Kemp* v. *Sober*, 1 Sim. (N.S.) 517; 20 L. J. (Eq.) 602.

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I am not inclined for my own part to base my opinion upon the mere technical difference between negative words and affirmative words in a covenant. Whether they are negative words or affirmative words are very excellent reasons in considering whether it is meant that the thing should be done, or whether it is not meant, but I do not think it is advisable upon that ground to say that while negative words would shew *primâ facie* you are not to do the thing, affirmative words may mean, but do not necessarily mean that, unless the whole context shews that such is the intention of the parties. Even where there have been negative words, circumstances may change, so that though the covenant still remains it would not be reasonable that it should be enforced. I think the case of *The Duke of Bedford* v. *The Trustees of the British Museum* (1) illustrates very well what I mean. There a covenant not to raise a garden wall above a certain height was made between the Duke of *Bedford* and Lord *Montagu* when they were occupying two large houses with gardens adjoining each other, and the covenant remained after *Montagu House* had been turned into the *British Museum*, and after the Duke of *Bedford's* garden had been turned into *Bedford Square*, and it was then sought to enforce it in Equity against the *British Museum;* the Duke of *Bedford* acting no doubt for the benefit of the tenants of his houses in the square. What Lord *Eldon* said was, If he has a right to enforce the contract he may enforce it, but circumstances have been so changed by time that it is unjust and unreasonable to enforce in Equity this contract against the *British Museum* in favour of *Bedford Square*, though he would enforce it without much hesitation in favour of the Duke of *Bedford* against Lord *Montagu*, if they had been both occupying their gardens at the time. That strikes me at once as the common sense view of the matter. As long as it fair and right and proper that the Court should enforce the bargain which is made, the Court does enforce it, even although it might think the bargain a foolish one; it is a bargain, and being one must be enforced.

I am inclined to think that construing the covenant in the present lease as one would construe a covenant at law, it means that the lessee should keep up the store-house or stores such as they

(1) 2 My. & K. 552.

were, that they were to be kept repaired and maintained. And although there are other words to say that they are also to maintain any improvements there, and, in the second lease, that they are also to keep up and repair any houses that may be built (shewing clearly enough that the parties contemplated that improvements of the buildings might be made), still I am inclined to think that the meaning of the covenant was that the stores should be kept and maintained and repaired; and to pull them down and make a serious alteration of them, however it might appear to improve the property, would be a breach of that contract. I do not think it is necessary to decide that, but I think, putting it in the most favourable way that it can be put for the Appellant, the contract may be said to bear that meaning, and I will assume it bears that meaning; but I am equally clear that no one after reading that contract, and having no regard to the technical point as to there being affirmative or negative words, could say there is anything in that contract that amounted to a stipulation such as the one which I have mentioned of not using the house as a ladies school. There is nothing in the covenant which would be of the essence of the contract, or a stipulation of that sort which would lead a Court of Equity in its discretion to say that the parties have bargained that this should be a store, and never should be changed from a store, and that therefore the bargain so made shall be kept in force for the 999 years.

When a bargain of that sort is made, the question as to whether the Court of Equity would or would not interfere to enforce it must depend upon circumstances. A case might very well arise where affirmative words involve a negative. I think myself the true construction of saying I will maintain a storehouse involves the negative—I will not pull it down. But when a Court of Equity has to consider whether it shall interfere, it would take into its view these grounds—I will not repeat them—which the Lord Chancellor has mentioned to be considered. Is it a contract which must be enforced because damages will be inadequate? No. In the case of the school it was so. Is it a case in which irreparable mischief and damage would be done by pulling down the storehouse? I do not say there could not be such a case, and a very important element to consider is whether the term of the lease be

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long or short. In such a case as that of *Smyth* v. *Carter* (1), if it could be really established that there was a tenancy from year to year, and that the notice to quit would expire at the end of eighteen months, I am not at present required to say, and I do not decide, that a Court of Equity might not say, that when a man was pulling down the house for the purpose of making improvements, such an act would be irreparable. The Court might say to the tenant: You are going to build a brewhouse which you say would be much better, but you will not finish that brewhouse before your notice to quit expires. You cannot get any good out of it, your alteration is one which can do you no good, and which the landlord says he objects to strongly, and upon such a matter as that I think he would be entitled to exercise his own will, though that might not be an advantage to him.

I am not by any means prepared to say a Court of Equity would not interfere there and grant an injunction, and very properly. But when we come to such a case as this, where there was originally a long term of 999 years of which upwards of 900 still remained to run, and the premises as they are proposed to be altered will evidently be more than ample security for the rent, the risk of damage to the Plaintiff is extremely small, and, as was pointed out by the noble and learned Lord on the woolsack—I will not repeat it—the certainty of inconvenience and injury to the tenant is very great; therefore it seems to me upon these grounds, so far as the covenant is concerned, the Judges of Appeal were quite right, in the exercise of their discretionary power, to refuse to grant an injunction to prohibit the alterations on the ground of the covenant. My Lords, I have already said that, whilst I feel no doubt about that, I am very glad that the Lord Chancellor, who has had so much more experience in Equity matters, has taken the opportunity of stating the course of practice in the Courts of Equity in dealing with these matters, which practice agrees exactly with what seems to me to be the common sense of the thing, as derived from the considerations as to what would be the effect of covenants of this sort.

Now, as to the question of waste, I think that is even still clearer. The old writ of waste is gone, and we have nothing to do with

(1) 18 Beav. 78.

it now, but an action in the nature of waste still exists in the Courts of Common Law. It is perfectly clear that in an action of waste you cannot recover nominal damages only, you must get real damages. The jurors must not find for you unless they think there is substantial and real damage. Now, as to what constitutes real damage, it is clear that in a case where jurymen found three farthings they found no damages at all; and in the case of *Doe* d. *Grubb* v. *Lord Burlington* (1), where it was a question whether it was waste so as to forfeit a copyhold, the probabilities are that the pulling down of a barn there was not waste, because it was a taking down of an old structure which had become practically useless, and the act was not an injury to the inheritance at all. But even supposing there was an injury, and that there was something for which there might be damages recovered, is it obligatory upon a Court of Chancery to grant an injunction to prevent it under all circumstances? I think not. I think it goes on much the same principles as have been mentioned before. I find in that case of *Greene* v. *Cole* (2) it is laid down that the Court of Equity would not interfere and grant an injunction to restrain waste where the damages are trivial. Lord *Eldon*, in *The Governors of Harrow School* v. *Alderton* (3), mentioned the practice which the Courts of Law have established, that they would not enter judgment for the Defendant where the damages were very small. *Blackstone* says (4) twelve pence, but what the value of that twelve pence was you must go back to the days of King *Richard* to ascertain. I suppose it would be a larger sum than now, but still a small sum. I do not know whether stronger words could be used than those of Lord *Eldon* as to what was or was not trivial. That was his view of the matter. In the case Mr. *Kay* was referring to (5), the jury found it was improving waste, but it was held to be waste "notwithstanding the melioration, by reason of the alteration of the nature of the thing, and the evidence thereof," and the jury gave a verdict accordingly with 100 marks damages, and the Lord Chancellor seems to have enter-

(1) 5 B. & Ad. 517.
(2) 2 Wms. Saund. 252.
(3) 2 B. & P. 86.
(4) 3 Com. 228.
(5) *Greene* v. *Cole*, 2 Wms. Saund. 252, sec. 259, n; *Cole* v. *Green*, 1 Lev. 109, see p. 111.

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tained the suggestion that he might relieve the Defendant from that verdict. What the Lord Chancellor did was at the Defendant's instance, who had these damages awarded against him. The report is rather unintelligible, but it is evident that the Lord Chancellor, so far from thinking that the Court of Equity would be bound to grant its aid to enforce proceedings for waste where the property was actually improved, though its nature was altered, entertained serious doubt whether he would give relief in such a case. But when you come to the later cases, I think they are all uniform, that if the waste be something that would improve or would only trivially affect the inheritance, the Court will not interfere. Lord Chancellor *Sugden*, in the case in *Ireland* (1) which has been cited, explains that point, I think, very clearly. In the particular case where the waste was, he did grant the injunction —and that is intelligible enough—where from inadvertence in granting a long lease, a lease renewable for ever, mines or some thing of that sort which were not known or thought of were not included in the lease, and where the landlord could not enter upon the mines because he did not reserve the power, the only thing to be done under the circumstances was for the lessor and lessee to make an agreement as to how they should divide the profits of the mines. That was obviously the right course to take. Now, in such a case as that, where the tenant chooses to take upon himself to carry away the minerals bodily, it seems but right he should not be allowed to do that, and that there should be an injunction to prevent it. That was exactly the case before Lord Chancellor *Sugden*. It was not, however, a case of a mine of copper ore, but was a turbary from which the lessee was cutting the peats and selling them at the rate of £300 or £400 a year, and deriving a large revenue from their sale, it was quite plain that the lessor was entitled to say, "You have no right whatever to cut and carry away this turf of mine without my consent, and my consent you must pay for—you must make a bargain," and that, I take it, was the ground upon which Lord Chancellor *Sugden's* decision rested. I have no occasion to say whether that was right or wrong, but it was intelligible, and very different from the present case. Here the whole story shews that if there be

(1) *Coppinger* v. *Gubbins*, 3 J. & Lat. 397.

waste, and I think it very doubtful that a jury would say there had been a real substantial damage even to the value of a shilling, the mischief that would accrue to the tenant from forbidding him to make this alteration would be so very great, and the mischief which could possibly, upon any reasonable contemplation of the matter, accrue to the Plaintiff, the lessor, would be so very small and remote, that I think that upon that ground the Court was quite right in saying that their discretionary power to restrain should not be exercised.

I will only say one word about the alteration of evidence of title. I can perfectly understand that five or six hundred years ago that was an extremely serious matter, that where the evidence of title depended entirely upon the memory of witnesses, to change a meadow into a wood or a wood into a meadow would have been a serious matter as far as regards the evidence of title. After a few years it might be very difficult to trace which had been which. But now-a-days, when there are Ordnance surveys, and where, as in *Ireland*, there is a Court especially dealing with the titles to estates, giving titles, and where the property is marked out on a map, which map can be identified with the Ordnance map—and these maps it may well be supposed will continue to exist and may be referred to to the end of the term—any damage in regard to evidence of title is quite wild and chimerical, or is at least merely nominal. I think, if it is put in that way, it would scarcely be gravely said that a Court of Equity should grant an injunction or that the Court should act upon the rules of a former time and grant an injunction, because of a theoretical absurdity such as a supposed injury to title. I think, therefore, upon the whole, that the decision of the Court of Appeal was perfectly right, and should be affirmed with costs.

LORD GORDON entirely concurred.

Order of the Court of Appeal in Ireland affirmed; and Appeal dismissed with costs.

Lords' Journals, 2nd April, 1878.

Solicitors for the Appellant: *Hughes, Hooker, & Buttenshaw.*
Solicitor for the Respondents: *George K. Sherlock, Dublin.*

[HOUSE OF LORDS.]

H. L. (Sc.) DUKE OF SUTHERLAND . . . . . APPELLANT;
1878 SIR CHARLES W. A. ROSS, BART. . . RESPONDENT.
April 15.

Salmon Fishings—Statutes—Superior and Inferior Heritors—Erection on Foreshore improving Fishing.

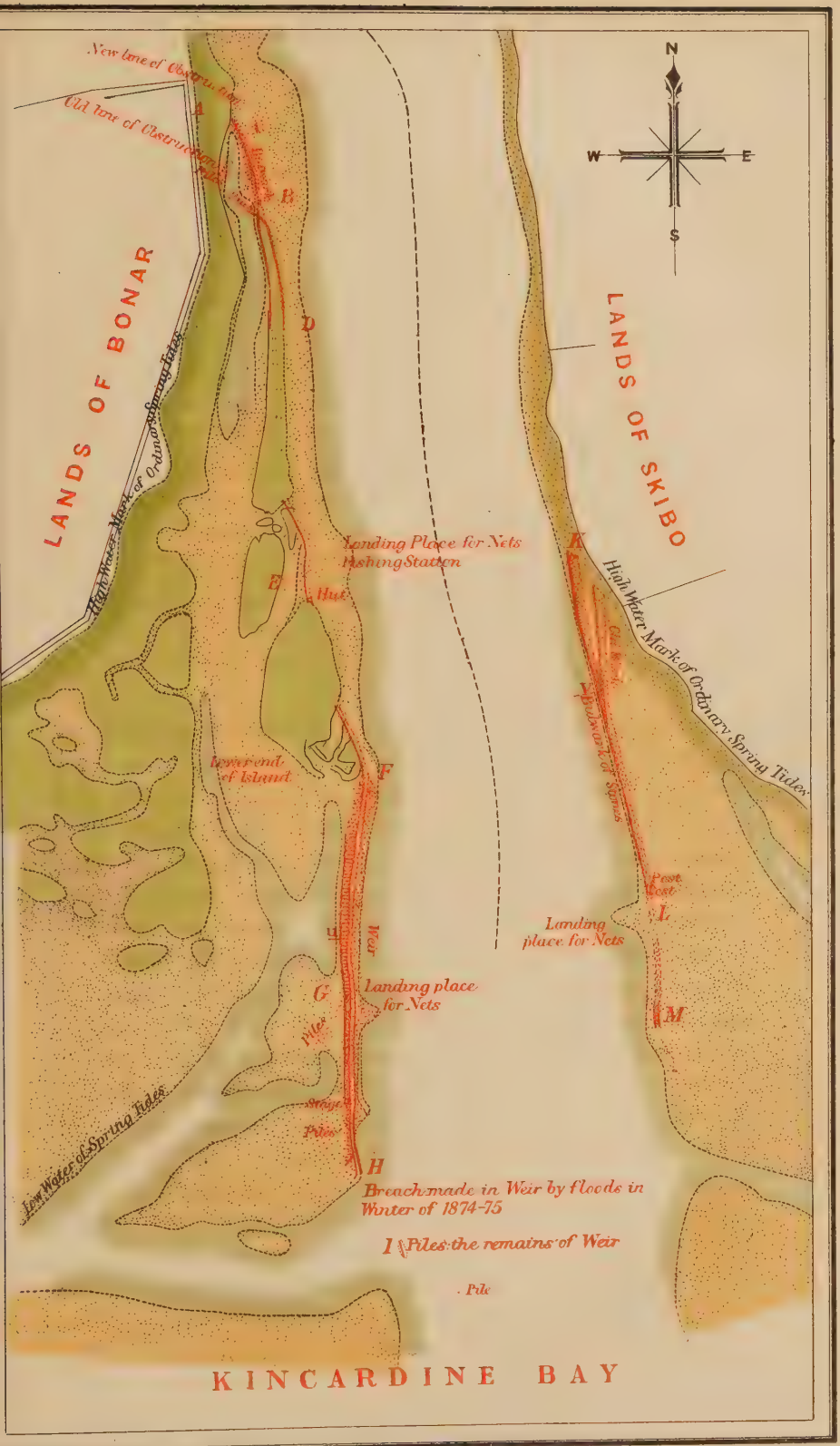
A proprietor of salmon fishings in an estuary opposite his estate, restored the foreshore by an embankment 16 inches higher than the original, which had been swept away by the tide, and this he did for the legitimate purpose of confining the river to its proper channel, and to protect his shore, and not as a device to obstruct or catch fish. The effect of thus raising the embankment was, not to prevent or to substantially impede the passage of salmon, although it did to some extent delay them and alter the course which they would take in ascending the estuary, and so facilitated their capture by the proprietor:—

Held, that the raising the embankment was not an illegal obstruction within the meaning of the Salmon Fishery Acts.

IN 1876 the Duke of *Sutherland*, as proprietor of valuable salmon fishings on the River *Shinn*, which runs into the *Kyle of Oykell* or *Sutherland*, several miles above the lands of *Bonar*, raised this action against the Respondent, Sir *Charles Ross*, of *Balnagown*, Baronet, proprietor of the lands of *Bonar*, and the salmon fishings *ex adverso* those lands; and also against Messrs. *Powrie* and *Pitcaithley*, tenants of Sir *Charles Ross* in the *Bonar* salmon fishings; to have it declared that certain artificial erections in the river or estuary of the River *Oykell*, near *Bonar Bridge*, were fixed obstructions to the passage of salmon and other fish of the salmon kind; or otherwise that the same were erections made, or materially enlarged, with the view of unduly facilitating the capture of salmon, to the prejudice of the Appellant: and that the obstructions were illegal, and ought to be removed.

Messrs. *Powrie* and *Pitcaithley*, considering their interests as sufficiently represented by Sir *Charles Ross*, did not resist the action.

The erections complained of on the Respondent's property are situated within the estuary of the River *Oykell*, in what is known as the *Kyle of Oykell*, which is an arm of the sea running inland from *Dornoch* for about forty miles within the limits specified in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LANDS OF BONAR
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Landing Place for Nets
Fishing Station
Hut
Lower end of Island
Weir
Landing place for Nets
Piles
Stone
Piles
Low Water of Spring Tides
Breach made in Weir by floods in Winter of 1874-75
Piles the remains of Weir
Pile
Landing place for Nets
Post
Post
KINCARDINE BAY
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the old Scotch Salmon Fishery Acts. The action of the tide and stream has separated a long narrow strip of ground from the land of *Bonar* on the west side of the main channel of the river. It is at both ends of this island that the banks have been raised by the Respondent; the upper bank being marked "A, B," and the lower one F, H, on the plan annexed. Between the mainland of *Bonar* and the island, a side channel of the *Kyle* has been formed 50 to 100 feet wide, leading from *Kincardine Bay* (a large, shallow expanse formed by the *Kyle* suddenly widening out towards the west just below the lands of *Bonar*) into the *Kyle* near *Bonar Bridge*. At the upper end of this channel there was a bank at A, B, from 1 to 2 feet above low water, which was covered in less than an hour of the tide beginning to flow, and the channel then formed a passage for the fish from the south-west portion of the bay into the main channel, and so to the upper waters. About thirty or forty years ago, it is alleged, the Appellant, then the tenant of the *Skibo* fishing on the opposite or north-east side of the river, *ex adverso* the Respondent's lands of *Bonar*, erected a bulwark of stones, K, L, which was added to in 1857, and the effect was to throw the water to a considerable extent on to the west side of the main channel, and gradually to wear away the bank F, G, H, of the island on the Respondent's property. This bank was 9 inches higher than low water.

In 1862 and 1864 the Respondent was compelled to repair this bank to keep the water from flowing from the main channel into *Kincardine Bay*, and thus injuring his fishery. In the autumn of 1866, or spring of 1867, the bank, F, H, was again swept away by the force of the river, and it was then lengthened, strengthened, and raised 16 inches, being made 4 feet wide. This structure was 280 yards long, and was covered at full tide.

In 1874 Messrs. *Powrie* and *Pitcaithley*, who had rented the fishing of *Bonar*, raised the bank, A, B, at the upper end of the island, and connected the main land. This embankment blocked up the channel between the lands of *Bonar* and the island; it was 4 ft. 4 in. high and 58 yards long, and within about a foot of high water of ordinary spring tides (1).

(1) The facts and evidence in the case are fully dealt with in the judgment of Lord *Gordon*, *post*, p. 749, who did not agree with the conclusions arrived at by the other Law Peers.

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The Appellant pleaded that both the obstructions being of the character of obstructions prohibited by the statutes (1), and being within a river and its estuary, and in a locality falling within the prohibitions of the Salmon Fishery Acts, were illegal and ought to be removed. Or otherwise, that they were illegal as they were fitted and designed unduly, and by artificial means, to facilitate the capture of salmon by the Respondent and his tenants.

The Respondent maintained that the erections were not within the statutes, but were only a legal exercise of his rights of property, and necessary for the protection of his foreshore and fishings. They did not obstruct the free run of salmon, and were not erected for the purpose of enabling the Respondent to fish in any illegal or unfair manner.

After proof the Lord Ordinary (2) found that the bulwark erected at the upper part of the island (A, B) was illegal and was a fixed obstruction to the passage of salmon, and ordered it to be removed; but as to the lower embankment (F, H), the Lord Ordinary held that it was not illegal. Against this interlocutor the Appellant reclaimed; the Respondent acquiescing in the judgment.

The Second Division, on the 26th of May, 1877, confirmed the Lord Ordinary's interlocutor (3).

On the appeal to the House,

Feb. 19, 21, 22. Mr. *J. B. Balfour*, and Mr. *Mackintosh* (of the Scotch Bar), contended, for the Appellant, that the lower raised embankment (F, H), which had not been ordered to be removed, was also an illegal obstruction. Anything which tended to obstruct the free passage of salmon came under the Scotch Fishery Acts. This embankment was not only an obstruction to the passage of fish, but was also an obstruction in the sense of affording undue facilities for their capture. It impeded and kept the fish lingering about until they fell into the Respondent's nets, for the fish coming from *Kincardine Bay* up the west channel between the island and the mainland, would not find enough water to float them over the natural bank at the upper end, into the main channel near *Bonar Bridge*. They would then either linger in the channel, or fall

(1) See *infra*, p. 739. (2) Lord *Young*.
(3) Scotch Cases, 4th Series, vol. iv., p. 765.

back into the bay, and in either case would be taken by the Respondent's nets; or, being compelled to come round the end of the lower embankment (F, H), they were caught by the fishermen *ex adverso* the land of *Skibo*. The *Skibo* fishings were also rented by Messrs. *Powrie* and *Pitcaithley*. Thus the embankment, F, H, acted as a stake net would in *guiding* the salmon into a place where it was difficult, if not almost impossible, for them to escape (1). Since the erection (F, H) was made in 1867, the Respondent had used more boats and nets than he had previously done, and had fished every tide. The embankment more directly facilitated the capture of fish, by affording the means of casting and drawing the nets, where it was not possible to do so before. If the Respondent's fishing and foreshore had been injured by the bulwark erected *ex adverso* the *Skibo* lands on the opposite shore, his proper course would not be to raise a counter embankment, but to obtain by legal means the removal of the *Skibo* bulwark. There was no doubt that the embankment was an obstruction in purpose and design, and illegal under the Acts 1424, c. 11; 1427, c. 6; 1469, c. 38; 1477, c. 73, or 1478, c. 6; 1488, c. 16; 1489, c. 15; 1563, c. 68; 1579, c. 89; 1581, c. 3; 1685, c. 20; 1696, c. 33; 1698, c. 3; 1705, c. 2 (2). These statutes, although in terms applying only to particular fixed engines, or particular modes of fishing, had been extended by analogy so as to include and strike at every description of barrier or permanent erection: see *Grant* v. *McWilliam* (3). A structure which even to an inconsiderable extent impedes or delays fish may become an obstruction by serving directly or indirectly to facilitate their capture. And it was of no importance whether the structure be itself an engine for the capture of the fish, or guides them about a point where they may be captured: *Cunningham* v. *Taylor* (4); *Copland* v. *Maxwell* (5); *Hay and Husband* v. *Magistrates of Perth* (6); see also *Lord Kinnoull* v. *Hunter* (7). There had always been a channel from the *Kyle* at the lower end of the

(1) *Buchanan's* Remarkable Cases, 254.

(2) As to the statutes see *Earl of Kintore* v. *Forbes*, 31 May, 1826, 4 Shaw, at p. 650.

(3) Referred to in note to *Ramsay* v. *The Duke of Roxburghe*, 10 Dunlop, at p. 666 (1847).

(4) May 18, 1804, *Hume's* Decisions, Court of Session, 715.

(5) Faculty Collections (1810), vol. xv., at p. 701.

(6) 4 Macq. 535.

(7) Morr. 14,301; *Stewart* on Rights of Fishing, pp. 154, 162.

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island (F, H) into *Kincardine Bay*, and it was illegal to erect an embankment in the *alveo*, which would have the effect of injuring the rights of fishing proprietors: *Forbes* v. *Smith* (1). The evidence proved that the erection had been made for the sole purpose of improving the *Bonar* fishings, and the Respondent was not entitled to make such an erection: *The Duke of Queensberry* v. *The Marquis of Annandale* (2). Therefore the obstruction should be removed, as being illegal and injurious (3) to the Appellant's fishings higher up the river.

The Lord Advocate (Rt. Hon. *William Watson*, Q.C.) and Mr. *Benjamin*, Q.C. (with them, Mr. *Henry Johnston*) maintained, for Sir *Charles Ross*, that the raising of the bank F, H, higher by 16 inches had been performed in the undoubted exercise of the Respondent's rights to protect his foreshore and fishings. It was not in any way a fixed engine, nor was there any allegation that the Respondent fished in any other way than by net and coble. The mere fact that an artificial hauling-place was used did not make the embankment illegal. The erection was not in *alveo*. The Respondent holding on a barony title had a title to the foreshore: *Agnew* v. *The Lord Advocate* (4). Now that the embankment at the upper end (A, B) of the island had been removed there was no illegal impediment to the free passage of fish up the river. The result of the judgment in *Hay and Husband* v. *Magistrates of Perth* (5) seems to be, that provided a free and unimpeded access is afforded to the upper waters, and an unimpeded return to the sea, nothing done by an inferior heritor could be objected to on the ground that it gave him an increased advantage over a superior heritor in the capture of fish. In *The Duke of Queensberry* v. *The Marquis of Annandale* (2) the injury was the erection of a dam-dyke across the river, and an improper and illegal mode of fishing by means of a large number of nets fixed in the river in alternate positions, each running so far across as to overlap one another. In *Kinnoul* v. *Hunter* (6)

(1) Shaw & D. p. 602; 1 Wilson & Shaw, App. Ca. 583; 3 Shaw & D. p. 162.

(2) Morr. 14,279.

(3) *Buchanan's* Remarkable Cases, at p. 313.

(4) 11 Macph. (1873) p. 309; also see *Ross* v. *Duke of Sutherland*, 3 Bell's Apps. 315.

(5) 4 Macq. 535.

(6) Morr. 14,301; *Stewart* on Rights of Fishing, pp. 154, 162.

there was an inclosure to guide the fish into. The case of *Forbes* v. *Smith* (1) was the erection in the *alveo fluminis* of several "sights," and of a tow-path by the proprietor of salmon-fishing, who had no property at all in the banks on either side. There was no question in that case as to the application of the statutes anent salmon fishing. There the proprietor of the lands (*Smith*), just as in this case, erected an embankment to protect his foreshore from the encroachments of the river, which was held good. In *Mather* v. *Macbraire* (2), a proprietor was held entitled to close by artificial work a new channel which had been formed: see also *Magistrates of Nairn* v. *Brodie* (3). *Grant* v. *McWilliam* (4) was quite different, there the fish were guided to a narrow channel, where they were speared as they passed. In *Copland* v. *Maxwell* (5), a row of stones was placed in the river; this device was not to stop the fish, but to aid the mechanical working of the net by stopping it, and making it to sink in a deep pool. Mere fanciful objections by the superior heritor to the operations of an inferior heritor, where substantial damage is not suffered, could not receive effect: *Colquhoun* v. *Orr Ewing* (6). There was no channel of the river at the lower end of the island into *Kincardine Bay* until after the *Skibo* bulwark was erected. And all the Respondent did was to repair the injury done to his property. Therefore the erection complained of being necessary for the protection of the Respondent's lands and fishings, and not being an illegal structure either under the statutes, or the Common Law, the appeal ought to be dismissed.

Mr. *Balfour*, in reply.

1878
April 15.

The following opinions were delivered by the Law Peers:—

LORD CAIRNS, L.C.:—

My Lords, the Respondent in this case is the proprietor of the lands of *Bonar*, and of the foreshore and salmon fishings in the *Kyle of Oykell ex adverso* his lands of *Bonar*. The Appellant is

(1) Shaw & D. p. 602; 1 Wilson & Shaw, App. Ca. 583; 3 Shaw & D. p. 162.

(2) 11 Macph. 522 (1873).

(3) Morr. 12,779.

(4) 10 Dunlop (1847) at p. 666 in note.

(5) Faculty Collections (1810), vol. xv. at p. 701.

(6) 2 App. Cas. 839.

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the proprietor of salmon fishings higher up in the River *Shinn*, which runs into the *Kyle;* and the action has been brought by him to compel the Respondent to remove two erections which he has placed upon his foreshore, on the alleged ground that these erections are in contravention of the Acts for the regulation of salmon fishing in *Scotland*. One of these erections the Court has ordered to be removed, and as to it there is no appeal. The other erection the Lord Ordinary and the Second Division of the Court of Session have unanimously refused to order to be removed, and their interlocutors in this respect are now submitted to your Lordships upon appeal.

I do not think it necessary to describe minutely the second of these erections, the details of which have been so lately under your Lordships' notice. It is a bank running lengthways by the side of and parallel to the channel of the *Kyle*, uncovered at low water but covered by the tide, and marked on the plan with the letters F, G, H, I. I think it clearly made out by the evidence that previously to 1862 there was a firm bank of shingle running along in this line F, G, H, I, forming a foreshore to the low-water channel of the *Kyle*, and confining the *Kyle* in its natural course, and preventing it breaking into *Kincardine Bay*. It is clear that, whatever may have been its former dimensions, it was, immediately before 1862, at least nine inches above the level of low-water mark, and at this height it was sufficient to prevent the water from the low-water channel of the *Kyle* breaking across into *Kincardine Bay*, the level of low water in which it appears to have been lower than the level of low water in the main channel of the *Kyle*.

In 1857 an embankment was made by the proprietor of *Skibo*, at the opposite side of the *Kyle*, the effect of which was to throw the water to a considerable extent against the *Bonar* side of the main channel, and gradually to wear away the bank confining the channel on the *Bonar* side. In 1862 and 1864 this bank was therefore repaired, but having burst again in the autumn of 1866, or the spring of 1867, by the pressure of the main channel of the river, it was strengthened and made firmer, and a course of stones placed along the top of it, raising it 15 to 18 inches in height. Even when strengthened in this way the bank has not proved

adequate to resist the pressure of the stream, for, the river having taken a set in the direction of *Kincardine Bay*, a breach has been made in the bank since 1868 at H, I.

Putting aside the question of the salmon fishings, beyond all doubt this bank, as raised in 1868, was an erection which the Respondent had a perfect right to place on his foreshore, and the conclusion at which I have arrived upon the evidence is that the erection was placed upon the foreshore in perfect good faith, and for the legitimate purpose of confining the water of the river in its proper channel. I do not believe, upon the evidence, that it was intended to obstruct the passage of salmon, or to facilitate the catching of salmon. It is stated that the work done to the bank was intended to improve the fishings of the Respondent, and expressions of some of the witnesses to this effect were used to shew that this erection was really devised as a mode of fishing; but the manner in which it was to improve the fishings is clearly described by *Pitcaithley*, the tenant, where he says:

> These operations were for the purpose of keeping the water from bursting through. The object was to improve the fishing. The ground was quite high enough for fishing purposes with Mr. *Lipscomb's* weir there. (That is the bank as repaired in 1862.) If the water had burst through and formed a new channel to *Kincardine Bay*, that would have injured our fishings.

The result is, that the Respondent on his own foreshore strengthened and raised the height of the old bank which confined the river in its proper channel—the bank, even when thus raised, being entirely covered at high water. In what way, then, is it said that this a matter of which the Appellant, as the owner of salmon fishings higher up, can complain?

It is contended that salmon which at certain times of the tide might desire to pass from the side channel in *Kincardine Bay* to the main channel of the *Kyle*, would be met by this bank and prevented crossing over, and that the bank is therefore an obstruction to the passage of salmon. It is not said that the obstruction would prevent them going up the river, but that it might delay them in passing up, or oblige them to go up by the side channel rather than the main channel, or force them to go round; and that while thus delayed or forced to go round they might be caught in the shoot of a net.

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If this result is illegal it must have been made so by some positive law. Your Lordships are well aware that a very wide construction has been given, especially by the Courts in *Scotland*, to the old Scotch Salmon Fishing Acts; but I am not aware of any case in which those Acts have received a construction which would strike at a work like that of the Respondent. The Acts are directed against devices fixed in rivers or tidal waters for the capture of fish, especially "cruives and yairs." A lawful work done in a river for a lawful or necessary purpose, and not as a device to obstruct and catch fish, would not be brought within the Acts, although the effect of it may be to deflect or to some extent to alter the course which salmon might otherwise take.

A clear example of this is to be found in the case of *Trotter* v. *Hume* (1), decided in 1757 in the Court of Session. *Trotter* there brought an action against *Hume* to remove a gallows and ladder erected at the east end of the island of *Annabat* in the *Tweed*, for the purpose of viewing the fish in the river, and to demolish a bridge between the north bank of the river and the east or lower part of the island. It was stated that the bridge was 226 feet long, supported by three stone pillars and thirteen pillars of wood, by which of course the water was greatly interrupted and the salmon frightened from coming up the stream, and by the means of spates or land floods this channel of the river might, by the obstruction of the bridge, be much filled up, which would lead salmon into the other branch belonging to a different proprietor. With respect to the gallows and ladder, it was a machine 18½ feet high. The water near it was shallow, and it was impossible it should fail to frighten the fish when coming up. The Lords at first found that the Defenders had no right to erect a bridge between the banks of the river and the island, and ordained them to demolish the bridge already erected, and discharged them from erecting any bridge in time coming, but assoilzied them from the conclusion of the declarator as to the gallows; but upon a reclaiming petition the Lords assoilzied the Defenders from the conclusion of the declarator as to the bridge, and adhered as to the gallows.

My Lords, it appears to me that, if in the case now under appeal

(1) Morr. Dict. 12,798.

your Lordships were to differ from the unanimous opinion of the learned Judges of the Court of Session, you would be straining the statutes for the protection of salmon very much further than they have ever yet been extended, and this I certainly am not prepared to advise your Lordships to do. I have, therefore, to move your Lordships that this appeal should be dismissed with costs.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion. Upon the evidence which has been placed before us, it appears to me that this case exemplifies extremely well what the actual law is with reference to impediments placed in rivers, as contrasted with works executed by a proprietor of the soil merely for the protection of his shore.

The Court below have directed the destruction of a certain impediment, the bank or embankments marked A, B, upon the plans, which would have had the effect decidedly of impeding the salmon in their passage up the river, combined with what now remains to be disposed of, that is to say the embankment or work marked F, G, H, I. The one embankment, namely, that marked A, B, had the effect of preventing, or impeding seriously, the fish in their passage up the stream. The present embankment is parallel to the stream, and it in no way impedes the passage of the fish. There is a passage for them on the right or left side of an island which is referred to in the proceedings before us, and it is distinctly in evidence that that which is now complained of, the embankment marked F, G, H, I, or a similar structure, was erected in consequence of works which had been erected at *Skibo*, on the opposite side of the stream, having directed the force of the current in a direction in which it had not before been active, directing it to cross this island which divided the two portions of the channel, and having thereby occasioned very considerable injury and damage to the Respondent, Sir *Charles Ross*, with respect to his property. In repairing that damage, it may be that facilities have been afforded for catching salmon, but the mere fact that facilities are afforded for catching salmon when there is no obstacle to the passage of the salmon up the river, is, I apprehend, not struck at by any Act of Parliament with which we have been made acquainted in the course of the argument, or any which can be found.

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I think therefore, my Lords, upon the facts of the case even if it should be that the salmon might be caught somewhat more readily from the circumstance of this erection being made, it having been erected with the *bonâ fide* view of repairing damage which had already been done; and it not having been brought to its present height until it had been shewn by repeated accidents which had occurred, by the breaking down of the wall, that that height was necessary, there is nothing whatever to impede the free course of the fish up and down the river. It may make the time when the fish can traverse from one channel to the other channel a little earlier or a little later, possibly, but it does not impede their passage. I take it that this case sufficiently exemplifies what it is that is unlawful with reference to an impediment in the lower part of a stream as regards the passage of the fish, and that the former impediment having been removed, there is now no reason whatever for complaint on the part of the Appellant in respect of that erection which has been unanimously allowed by the Court below to remain.

LORD BLACKBURN:—

My Lords, I also am of opinion that this appeal should be dismissed with costs. I do not think it necessary to enter on the the case at all minutely. The law of *Scotland* as to salmon fishing as far as it comes in question in the present case, is clearly laid down in the case of *Hay* v. *Magistrates of Perth* (1).

The facts raising the question on which your Lordships are now called on to decide are not, I think, in dispute. [Having stated the facts of the case, his Lordship proceeded:—] The Respondent has not appealed against that part of the judgment of the Court below which directed him to remove what was erected by him at A, B, and that is not now before your Lordships. The case is to be considered as if the artificial erection at A, B, (which is to be removed) had never existed. And on the argument at your Lordships' Bar the counsel for the Appellant admitted that the evidence shewed that the artificial work on F, H, as made in 1862, did no more than restore the tail of the bank to what had been its normal condition before the embankment at

(1) 4 Macq. 535.

Skibo drove the current against it and cut it away, and it is clear that the Respondent was justified in doing that much. But it is agreed by the parties, and is proved on the evidence of Mr. *Pitcaithley*, the tacksman of the fishings and one of the Defendants below, that in repairing it in 1868 the tail of the bank was raised about 18 inches higher than it was before, and to some extent lengthened; and this alteration must have deprived the fish that came up the western channel, at flood tide before the bank at A, B, was passable, or at ebb tide after it ceased to be so, of the power of crossing the tail of the bank into the eastern channel, and must have caused less water to flow into *Kincardine Bay* during ebb tide than did before. So far as these facts go there is an interference with the passage of the fish. But I do not think it amounts to an illegal obstruction.

My Lords, I think that Lord *Gifford* in the Court below very truly says that the first question is whether, supposing that Sir *Charles Ross* had not the salmon fishings, or that there were no salmon fishings at all there, the owner of the fishings above could have said that the mere lengthening of the island, or raising the height of the bank at the tail of the island, was an obstruction illegal within the statutes as expounded by judicial decisions (1).

My Lords, I think it must in every case be a question of fact, a question on the evidence of more or less, whether an artificial work, which prevents the fish from swimming as they were used to do, is or is not such as to be illegal as being in contravention of what Lord *Westbury*, in *Hay* v. *Magistrates of Perth* (2), stated to be one of the objects of the old Scotch Fishery Statutes, "to ensure to the salmon a free and unimpeded access to the upper fresh waters which are the natural spawning ground of the fish." I do not think it is necessary to prove that what is said to be an obstruction totally deprives the fish of such access: I think it is illegal if it really and substantially impedes that access. On the other hand, I do not think it is enough to make it illegal to shew that it renders the mode of access different from what it was, unless that change in the mode of access really and substantially impedes it. Now, if I have correctly apprehended the facts to be as above stated, it seems to me that the mere statement of the case shews that, if

(1) Scotch Cases, 4th Series, vol. iv. at p. 777. (2) 4 Macq. at p. 543.

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there were no nets here, the prolonging of the island could not be a substantial impediment to the access of the fish to the upper spawning grounds. And I do not think that the witnessess for the Pursuer say that it would. The Court below asks Mr. *Young*, "*Q.* It obstructs the passage of the fish just by giving facilities for netting?—*A.* Exactly." And it seems to me that this question and answer really give the effect of the evidence of all the witnesses who say that in their opinion it was an obstruction. But there are salmon fishings at the spot, and it is necessary to consider whether that makes any and what difference.

I think it appears, without going out of the evidence of Mr. *Pitcaithley*, that he has fished the water harder than it had been fished before, used more boats, and more nets, and more men, and that the men can fish longer in consequence of the bank being raised, and that they catch more fish, and in consequence the upper fishings have been falling off in value. This is a loss to the upper heritor, and no doubt very annoying to him, but it is *damnum absque injuriâ*.

I think it probable, though it is not proved, that the effect of this hard fishing may be to diminish the number of breeding fish which get up to such an extent as to cause the number of fish bred in the river to diminish, and so to produce the public mischief which the numerous Scotch Acts are directed to prevent. But no one of those Acts is framed so as to prevent the owner of the lower fishings or his tacksman making an excessive use of the legal modes of fishing. It may be improvident in the lower heritor to do so. He may, as Lord *Deas* said, in the case of *Hay* v. *Magistrates of Perth* (1), not improbably "fare like the owner of the goose in the fable that laid the golden eggs." And the Legislature may by some future legislation regulate the use of the legal means of fishing so as to prevent hard fishing. But no restrictions have yet been laid on the owner of fishings further than those of the statutes, which, compendiously stated, are that he may not use any fixtures as part of the machinery by which he catches the fish.

My Lords, I do not say that an artificial work might not be so connected with the mode in which the fish are caught, even though the fish were taken out of the water by the net and coble,

(1) 4 Macq. at p. 543.

as to come within the extensive terms of being "sic like" with the enumerated modes of fishing which are prohibited. The decision of the Lord Ordinary in *Copland* v. *Maxwell* (1) may have been quite right on this principle.

But, though I do not say that it is impossible in law, I think it clear that in this case it was not so in fact. The new Bay shot (2) appears on the evidence not to be used, or capable of being used, except when the water is so high as to allow fish to cross freely at A, B, and, indeed, the counsel for the Appellant were driven to contend that any delay of the fish became a material obstruction, because, the tacksman fishing very hard, it was important that the fish should pass rapidly beyond the sweep of his nets. It would, I think, be an unwarrantable construction of the existing Acts to extend them to such a case as this, and it would be going much further than any decided case of which I am aware.

LORD GORDON :—

My Lords, I am in the unfortunate position of not being able to concur in the judgment which your Lordships are about to pronounce; and as I also differ from the judgment pronounced in the Court below there is a presumption that the views which I take of the case are erroneous. But I have very carefully considered the case,—and have anxiously re-considered it since I became aware of your Lordships' views in regard to it, and I regret that I remain of the opinion which I at first formed. But in the view which your Lordships take of the case the judgment appealed from will be of course affirmed. In the circumstances it is, however, incumbent on me to state my opinion more fully than I would otherwise have done in order to shew the grounds on which it is founded.

I think there is little or no diversity of opinion in regard to the law applicable to the case. It is not contended that there is any law with reference to the capturing of salmon, except that which has been recognised, after careful and ample discussion in this House, in the case of *Hay* v. *Magistrates of Perth* (3). In that case, the Lord Chancellor (Lord *Westbury*) Lord *Chelmsford*

(1) Faculty Collections (1810), vol. xv. p. 701.

(2) A new shot started in 1867; and taken from the mainland of *Bonar* at the point where *Kincardine Bay* on the west, narrows into the side channel.

(3) 4 Macq. 535.

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concurring, thus stated the principle upon which the old Scotch Salmon Fishery Acts had been framed (1):

> It is most important to observe the principle which these Acts embody, and the objects which the Legislature sought to attain. My Lords, they are directed to three objects, *one* to ensure to the salmon a free and unimpeded access to the upper fresh waters, which are the natural spawning ground of the fish. The *second*, to secure the unimpeded return to the sea of the smolt or young fry of the salmon. The *third* was to prohibit the killing of unclean fish, during the fenced months, as we call them in *England*, that is, when the fish are out of season. For the purpose of accomplishing these objects, which are clearly declared in various statutes from the very earliest times down to the latest, the statutes rendered it unlawful to erect any cruives or weirs in waters where the sea ebbs and flows. Cruives and weirs were allowed in fresh water with certain limitations. One was that there should be a mid stream, the width of which is carefully defined. The other that the hecks (as they are called) that is the interstices between the wicker work of the cruives, should be at least 3 inches wide. Fishing is also prohibited at mill dams by any description of fixed net or engine. And then there is an enactment rendering it absolutely necessary that a free passage should be given, both at the cruives and at the mill dams in fresh water, from Saturday evening to the rising of the sun on Monday morning. My Lords, these are the objects which the statutes sought to accomplish; and your Lordships will recognise in them provisions for preserving the breed of the fish; but they nowhere descend to any directions touching the mode or the manner of fishing.

I think this is a very valuable exposition of the principles of the Salmon Fishing Statutes. And while this House in that case reversed the judgment of the majority of the Court of Session, I think it is of consequence to observe that they in substance affirmed the view which had been expressed by the Lord President (the late Lord *Colonsay*) who dissented from the judgment pronounced by the majority. And the views of the Lord President, as delivered in the Court of Session, appear to have been adopted substantially by the noble and learned Lords who moved the judgment in this House.

The question which has to be decided in the present case is whether the principles so expounded have been contravened, and whether the weir or erection which is complained of impedes salmon in their "*free and uninterrupted access to the upper fresh waters, which are the natural spawning ground of the fish.*"

The weir or erection, which is here complained of, is situated within the estuary of the River *Oykell*, "where the sea ebbs and flows," in what is known as the *Kyle of Oykell*, which is an arm of

(1) 4 Macq., at pp. 543–4.

the sea running inland from *Dornoch* for about 40 miles within the limits specified in the old Scotch Salmon Fishery Acts. The salmon fishings in the *Kyle*, and particularly in the neighbourhood in question and further inland, are very valuable. The Appellant is proprietor of salmon fishings a few miles further up the river than the point where the erection is situated which is complained of, and which is on the property of the Respondent. There is no doubt that the Appellant has an interest in the estuary of the river, and is entitled to complain of any erections or weirs therein which create an obstruction to the free passage of salmon up the river. And if it is shewn that the erection is truly an obstruction to the free passage of salmon, I am of opinion, as matter of law, that it is illegal, and must be removed. In my view, therefore, the matter at issue is reduced to the question whether the erection does, in point of fact, form an obstruction to the free passage of fish up the river.

In considering this question it is necessary to advert to the circumstances attending the erection of the weir or embankment. It has been erected to some extent along the bank of a low island lying on the west side of the main channel of the river, and the original embankment was afterwards extended beyond the island. On the opposite, or north or east side, of the river, called the *Skibo* side, now the property of Mr. *Sutherland Walker*, it is said that a bulwark of stones was erected about thirty or forty years ago, and that this bulwark was added to about the year 1857; and that the effect of that bulwark on the *Skibo* bank was to throw the water to a considerable extent to the west side of the main channel, and gradually to wear away the bank of the low island on the Respondent's property of *Bonar*. I think it is proved that this bank was composed of mud and shingle, and was only about 9 inches higher than low-water mark at ordinary tides. In course of time a channel was formed across the lower part of the island, carrying the water into *Kincardine Bay*, on the west side of the island. In 1862 the Respondent caused an embankment to be erected along the east bank of the island.

The Respondent now contends that this embankment (F, H) was erected for the sole purpose of repairing the breach which had been formed in his island. This may have been part of his pur-

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pose; but I think it is proved that his main purpose was to improve his salmon fishings. His factor, Mr. *Lipscomb*, and his engineers, Mr. *Paterson* and Mr. *Gordon*, in my opinion prove this conclusively in the passages from their evidence to which I shall afterwards refer. I think that both purposes were perfectly legitimate, provided they were carried out without injury to the rights of others. And it does appear that in his first operations the Respondent was careful to avoid doing anything which might be subject to challenge. Your Lordships have before you the specifications under which the weir of 1862 was erected; and you will find that while it was to be of a very substantial character, yet that it was specially provided that "the top of the piers should be about 10 or 12 inches above low-water," being not much, if any, higher than the height of the original bank of the island.

In 1864 an addition was made to the then existing weir, and your Lordships have also before you the specifications under which that addition was erected, and by these it was provided that the addition was "to be constructed in exactly the same manner as the existing weir," and it was further provided, "The height of the weir to be up to the height of the original gravel bank, which has been cut away by the new channel." I think these provisions were very judicious and proper, and it will be seen from the evidence of *John Ross*, the contractor who erected both weirs, and who was adduced as a witness for the Respondent, that the provisions of the specifications in regard to the height of the weir were carefully carried out. He says:

> That is the specification given me under which I worked. I adhered to it. Starting from the original slope at the end of the island, I made my erection across the breach, *and made it flush with the natural bank at the other end.* I afterwards made an addition to the work in 1864. No. 46 of Process is the specification under which I did so. The extension was made because the water had cut through the bank further down than the weir. At the end of the second weir which I made I drove piles into the natural bank to strengthen it. *My instructions were to drive these flush with the natural bank, and on no account to raise them higher.* I studied to adhere to these orders. The first work was inspected by Mr. *Paterson* before it was taken off my hands.

And on cross-examination he states:

> Referring to No. 43 (a detailed description of work done in 1862), *the top of the weir was* 9 *inches above low water. The natural bank where the weir joined it was* 9 *inches above low water,* but it might be higher or lower further on.

I am of opinion that if the Respondent had confined his embankment to the protection of his island, and had not exceeded the height of the original bank of the island, his operations could not have been successfully challenged by the Appellant. But from 1866 to 1868 a great addition was made to the embankment—its length was considerably extended, and its height was increased about 18 inches. In 1866 the Respondent let his salmon fishings to Messrs. *Powrie & Pitcaithley;* and Mr. *Pitcaithley,* in his evidence, states that he was bound by his lease to maintain the weir at the lower end of the island. He says:

In the autumn of 1866, or the spring of 1867, the weir was burst, a little below the island, when the river was in flood. I repaired the damage. I also strengthened the rest of the weir by putting 15 or 18 inches of stones on the top, and some behind, to keep it from running away. I could see no other plan to prevent it being carried away. I added a little to the length of the weir, but I do not know how much, perhaps 30 or 40 yards. These operations were for the purpose of keeping the water from bursting through. The object of that was to improve the fishing. The ground was quite high enough for fishing purposes with Mr. *Lipscomb's* weir there.

And again, further on, he states:

It was Mr. *Lipscomb's* weir that I heightened by stones 15 or 16 inches. The extension of the weir which I put up was raised to the same height.

The embankment, as it existed at the time the present action was raised, is described by the witness *William Paterson,* civil engineer, *Inverness,* who was the engineer employed by the Respondent in the construction of the embankment in 1862. Mr. *Paterson* says:

At the lower end of the islet I find that a weir has been erected stretching into the stream from F to H. That structure appears at one time to have extended down to I. The length of the weir from F to H is 280 yards, and there is a breach between H and I of about 40 yards. The weir stretches across a channel of the river. There is a channel running to the west of it. Where the breach exists between H and I the stream runs past in considerable volume. The tide runs very rapidly in and out, and it is difficult to take a boat against it. This weir has been raised from 3 to 4 feet above the level of the adjacent beach. I could not gather, from anything I saw, how high it had been raised above the level of the original beach at the spot. There seems to be some silting up behind. If anything, the original level of beach would be rather lower than the present level of beach, or perhaps generally the same. So far as I could judge the level of the original beach, where the weir is, had not been higher than the level of the adjacent beach. That applies to the whole distance between F and H. The width of the weir from east to west is about 4 feet. There is a pathway on the top of

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it. There is a landing place for nets upon it at G on the plan, and a smaller one between G and H with a gee for a windlass. The weir is constructed of two rows of piles about 4 feet apart, tied across, the inside being filled with turf and stones to make it water-tight. It is supported outside by a row of piles for a great part of the way, with back stays filled with stones and causeway. A great part of it is very substantial. From F to H the level of it is very uniform. It stands about 2 feet 4 inches above low-water of ordinary spring tides, and averages about 3 feet 6 inches above the beach. The top of the structure is 3 feet 6 inches below high-water of ordinary spring tides, and about 1 foot below high-water of neap tides. In ordinary spring tides the structure will be flush with the top of the water within two or three hours of high-water, and at neap tides within one and a half or two hours of high-water.

There are other witnesses who give evidence to the same effect with reference to the position of the top of the embankment in regard to the tides.

Matters seemed to have remained in this position till the year 1874 or 1875, when the Respondent erected another weir or embankment at the upper part of the island, and connecting the upper part of the island with the main land on the west side thereof. This embankment blocked up the west channel and prevented salmon from ascending the river by that channel. This embankment is described as extending from A to B on the plans produced.

The Appellant, shortly after the erection of this latter embankment, raised the present action, in which he asks to have it found and declared that the embankment A, B, at the top of the island, *and also* that which I have specially before referred to at the lower end of the island,

Are fixed obstructions to the passage of salmon and other fish of the salmon kind, and are situated within the limits of the River *Oykell* and its tributary streams, including the estuary thereof,

and that the obstructions were illegal and should be ordered to be removed, and the channel of the river or estuary restored to its former state before the erections were made. Both erections are complained of; and it is sought to have *each* of them removed.

The Lord Ordinary, and the second Division of the Court below, were of opinion that the erection A, B, at the top of the island was an illegal obstruction, and ought to be removed. The interlocutor of the Lord Ordinary, which was adhered to by the Inner House, found that the said erection A, B,

Is a fixed obstruction to the passage of salmon and other fish of the salmon

kind, and is situated within the limits of the River *Oykell* and its tributary streams, including the estuary thereof, and is illegal and ought to be removed; and decerns and ordains the Defenders to remove the same accordingly within the space of six months from the date hereof;

And the Inner House remitted to a man of skill to see that erection removed in terms of the Lord Ordinary's interlocutor. And it is said that it has been now removed.

Your Lordships have therefore only now to consider whether the weir or embankment at the lower end of the island comes within the same category of an illegal obstruction to the passage of salmon up the river.

The Lord Ordinary and the Second Division were of opinion that the Appellant had not established his contention that the weir or embankment in question formed an obstruction to the free passage of fish; and their Lordships, *quoad* that weir or embankment, assoilzied the Respondent from the conclusions of the summons. Their Lordships seem to have proceeded partly on the ground that it had been erected with the view of preserving the banks of the island, and was not more than was necessary for that purpose.

Now, my Lords, I am of opinion that the Respondent was entitled to repair any damage caused to the banks of his island, and also to maintain his fishings there in the state that they existed before the erection of the bulwark or embankment on the *Skibo* side of the river, which is said to have been what caused the injury to the Respondent's island and fishings; provided his operations did not cause injury to the rights of third parties. The decisions relied on by the Respondent, and afterwards referred to, shew that where a channel has been injured by a flood, and the rights of fishing proprietors have been thereby injured, it is lawful to cause the damage to be repaired, and to restore the channel to the state in which it was before the damage was done. But I do not think that there is any decision to the effect that, where injury *to fishings* is caused by a *novum opus* on the opposite bank, the proprietor whose fishings are injured is entitled to set up an erection on his side of the stream to rectify the damage done, if *the erection so set up has the effect of causing injury to other fishing proprietors.* It rather appears to me that the remedy of the pro-

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prietor whose fishings are alleged to have been injured would be to cause the *novum opus* which was the cause of the damage to be removed, and to have the stream restored to the position it was in before the weir was erected.

I think that the weir or embankment in question is much more than a mere repair of a broken bank. Several of the witnesses connected with the erection of the embankment by the Respondent state that it was made for the improvement of the fishings. Mr. *Paterson*, the Respondent's engineer, states, with reference to the weir of 1862, that it was explained to him that "it was desired to erect the weir in order to improve the fishings. No other object was mentioned to me than the improvement of the fishings." And again, "When I was consulted in 1862 nothing was said about the protection of the banks; it was the improvement of the fishings." Mr. *Gordon*, the engineer who prepared the specification for the weir of 1862, states, in answer to a question by the Court, that the object of erecting the weir "was to improve the salmon fishing." Mr. *Lipscomb*, the Respondent's factor, states that the embankment was erected in consequence of complaints by the fishermen. Mr. *Pitcaithley* says, "The object of that" (the extending and heightening of the embankment) "was to improve the fishing." And Mr. *Stevenson*, civil engineer, who was examined for the Respondent, says:

> I have no doubt the fishings would be the chief interest to be conserved there. I do not suppose the weir could have been put down for any other purpose than to help the salmon fishings; but I do not know.

It is perhaps not of much consequence to consider the *object* the Respondent had in view in erecting the embankment—because if it is not illegal, he was entitled to erect it—but when it is found that the object of erecting it was the improving the Respondent's fishings, and when it is complained by the proprietor of another fishing that his rights have been injured by the operations complained of, there is certainly fair room for the inference that something more has been done than was actually necessary for repairing damages done to the Respondent's island. And accordingly on examining the evidence which has been adduced, I think it is found that the operations complained of exceeded what was necessary for mere repairs. It is seen that the original bank of

the island was only 9 or 10 inches above low-water mark. The embankment is now, according to Mr. *Paterson's* evidence, "about 2 ft. 4 in. above low water of ordinary spring tides, and averages about 3 ft. 6 in. above the beach." That is a very material difference, and I think there can be little doubt that such an addition to the height of the embankment at the place where it exists does form an obstruction to the free upward passage of salmon.

Your Lordships have before you the evidence which has been adduced in the cause. There is no question of *credibility* involved in the proof. There is, no doubt, as there is in almost every such case, difference of *opinion* among the witnesses. But your Lordships are in the same position for considering and judging of the evidence as the Court below were, and can consider and judge of the effect of the evidence for yourselves. It is with considerable diffidence that I venture to differ from the judgment of the Court below; but I have considered the evidence with very great care, and I have come to be of opinion that the Appellant has proved that the embankment, in consequence of its greater height than the original bank of the island, is an obstruction to the passage of fish up the river, and is therefore illegal. I shall shortly advert to a few passages in the proof which I think bear out the view I take of it.

Mr. *Archibald Young*, an advocate of the Scottish Bar, who is one of the Royal Commissioners on Salmon Fisheries, and who has had great experience in regard to all salmon fishery questions, inspected the embankment before the question was raised between the parties, and he says:

> I examined the weir at the foot of the island, both in 1870 and 1875. It appeared to me to be an obstruction to the passage of salmon upwards, and to be a large fishing encroachment upon the channel of the *Kyle*, barring a place where fish would naturally have passed if it had not been there, and injuring the upper proprietors of fishings by facilitating netting on the part of the lower proprietors.

John Urquhart, who was manager of the Respondent's fishings at *Bonar Bridge* from 1860 to 1865, states:

> The weir is now higher to the extent of less than 2 feet than it was when it was first made. In my judgment that weir would obstruct the passage of salmon to the upper waters at certain states of the tide. The weir was made with a view to improve the fishing.

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Donald Urquhart, a fisherman in the estuary, and who has lived in the *Bonar* district all his life, says, "Ever since I remember the islet there has been no bank as high, or nearly as high, as the present weir running out where the weir F, H, is." *Adam Robertson* who had about thirty years experience in connexion with salmon fishings, and who was acquainted with the locality in question, states: "I have no doubt that *both* the obstructions now complained of *are serious* obstructions to the passage of salmon up the river."

George Davidson, who is a tacksman of salmon fishings, and pays a rental of about £1500 a year, and who is a member of the *Don* District Fishery Board, and has been actively engaged in the management of salmon fisheries for forty years, says:

> The weir at the foot of the island, in my judgment, obstructs one of the main channels of the river. It is built across a channel by which salmon would naturally find their way into the main stream.

And on cross-examination by the Respondent, he says:

> When I speak of the injury to the upper proprietors I mean that that arises from fish being caught that would otherwise get up the river. I also believe that the obstructions in question would turn fish back altogether.

Mr. *George Cunningham*, civil engineer, *Edinburgh*, says:

> The top of this weir is level with the surface of the water about half tide of ordinary spring tides, so that for about half of every tide it would form a complete barrier to the passage of fish. It would be still longer a barrier to them at neap tides. It did not occur to me that there was any object for which the weir could have been designed, except to facilitate the fishing, and I thought it had been designed for that when I saw the men fishing from it. I saw no bank requiring to be protected by it. There is nothing behind it worth preserving.

Mr. *James Leslie*, civil engineer, who was one of the Salmon Commissioners under the Act of 1862, says:

> The weir F, H, stops the current of the tide away from the channel of the river down towards *Kincardine Bay*, and bars the passage of salmon till the tide is high enough to cover the weir. Salmon taking a particular line from *Kincardine Bay* into the main channel would be stopped by that erection. I see no reason why that should not be a likely line for them to take.

William Dunbar, who is a tenant of salmon fishings, for which he pays rents to the amount of nearly £5000, and who has taken a great deal of interest in the habits of salmon, and has watched

them closely, and who has known the *Kyle of Sutherland* since 1844, says, with reference to the point in dispute:

> There was a strong current there, both when the tide was ebbing and when it was flowing. In certain winds most of the salmon entering the kyle would go that way, and in other winds not so many. I am satisfied that considerable numbers of salmon would enter the *Kyle* by that place at that time. *There is now a weir at that spot which completely bars their progress so far as it goes.* Nothing of the kind was there in 1844–48.

I think these passages shew that the embankment, in its present state, does form a real obstruction to the upward passage of fish, and is therefore illegal.

It was contended on behalf of the Respondent that the embankment was on the foreshore of the island, and not in the *alveus* of the river; and that therefore the Appellant was not entitled to object to it. There is no doubt that there is part of the embankment on the foreshore, but the embankment has been extended beyond the island, and so far as it is so extended it is erected in the *alveus*. The Appellant, in the 8th article of his condescendence, says that it extends "*from the lower end of the island in a southerly or south-easterly direction for* 280 *yards or thereby into the said river or estuary thereof.*" And the Respondent, in the 5th article of his statement, says substantially the same thing. His statement is:

> He also, between 1862 and 1866, caused the outer bank of the said strip of ground to be faced with piles and boarding, and the detached pieces into which it had been broken to be joined with a narrow embankment. He also caused the said embankment *to be extended from the lower end of the said strip of ground in a direction parallel to the main channel of the Kyle.*

It thus appears that a very considerable portion of the embankment is not on the foreshore of the island, but in the *alveus* of the river. With reference to the argument as to the erection being on the foreshore, the Lord Justice Clerk says:

> It is a mistake to suppose that everything which is erected on the foreshore which may have the effect of altering the course of the salmon is an obstruction to which an upper inheritor is entitled to complain. That is not the meaning of the statute. An obstruction must be something which prevents the fish from getting up. If all that can be said is that while the fish have the choice of the two channels, going up by the right or west bank, or the left or east bank, there is an intermediate place where a fish might have gone across, which has now been shut up by the operations of the Defender, I do not think that is an obstruction.

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That the fish has to go two or three yards round in order to get up a stream is certainly not an obstruction to the passage of salmon in the sense of the statute; and it is wholly immaterial whether the result is to improve the fishing of Sir *Charles Ross*, seeing that if it be not an obstruction in the sense of the statute the Duke of *Sutherland* has no title and no interest to object to what has been done; and, subject to the provisions of the statute, Sir *Charles Ross* is perfectly entitled in a question with him to improve his own chance of catching salmon. I am therefore of opinion, first, that there was a good and reasonable ground for at all events a portion of the erection complained of; but, in the second place, that, as it stands, no part of it seems to me to come up to what is necessary in order to constitute an obstruction to the passage of salmon in the sense of the Salmon Statutes, and that consequently the Duke of *Sutherland* has no title to complain of what has been done upon ground belonging to the Defender. I should not have thought it of any consequence here that this was on the foreshore if it had been an obstruction, because, as I have already said, it is to obstructions to the passage of salmon by means of artificial erections within the flux and reflux of the tide, or in estuaries, that the statutes refer.

Now my Lords, I agree with his Lordship that if the erection here complained of is an obstruction, it is of no consequence that the erection is on the Respondents' foreshore; because it is admittedly within the flux and reflux of the tide. But the question whether the erection does or does not form an obstruction is one of fact, and that fact can only be ascertained by considering the evidence before the Court. In my view his Lordship seems to have overlooked that, and to have decided the case on a theory of his own, viz., that it is no obstruction to the passage of salmon in the sense of the statute if the fish has merely "to go two or three yards round in order to get up a stream." I am not sure that I would concur with his Lordship in holding that if an erection caused the fish to go only "two or three yards round," it was not an obstruction in the sense of the statutes. But your Lordships are not here dealing with such a case. You have it in evidence that the obstruction in question is 280 yards in length, and the fish would have to go all that distance before they could get round the end of the obstruction. I think that is very different from the theory with which his Lordship dealt; and that a barrier of the length of the one in question does form a very material obstruction indeed.

The only decision referred to by the Lord Justice Clerk, that of *Jackson* v. *Marshall* (1), had no reference to fishings but to operations by a riparian proprietor on the *alveus* of a private river; and

(1) July 4, 1872; 10 Macph. 913.

which were challenged by a conterminous proprietor. It is of the same class of cases as that of *Bickett* v. *Morris* (1), which your Lordships had recently under consideration in the case of *Orr Ewing* v. *Colquhoun* (2), but which cases have no application to the question presently before the House.

Lord *Ormidale* refers to the cases of the *Town of Nairn* (3), *Forbes* v. *Smith* (4), and *Mather* v. *Macbraire* (5), as shewing that the Respondent here had not exceeded his legitimate rights in repairing the injury done to his island and his fishings. But I do not think that these cases support his Lordship's opinion.

The case of the *Town of Nairn* (3) decided that in order to preserve their fishings the town was entitled to close up a channel which had been formed by a flood. But that was merely a case of repair necessary to restore the river to the condition in which it was before the injury was done.

I think the case of *Forbes* v. *Smith* (4) as decided in this House is not an authority in point at all. It had reference to the erection of an embankment by *Smith*, a riparian proprietor (but who had no right of salmon fishing) *in alveo* of the river *Findhorn*. This embankment was complained of by *Forbes*, the proprietor of the salmon fishings at the point in question, as being an interference with his rights; and he raised an action of declarator to have it found and declared that *Smith* had no right to make or construct any bulwark or embankment along the course of the river to his hurt and prejudice in the exercise of his rights of fishing. The Court of Session, without allowing *Forbes* to lead evidence of the injury caused to his rights by the embankment, assoilzied *Smith* from the conclusions of the summons. And what this House did was to remit the case back to the Court of Session, to inquire whether the bulwark or embankment was so constructed as to be injurious to the right which the fishing proprietors had of fishing in the river, and in a manner not necessary to its utility as a bulwark or embankment,—to that effect differing from the Court of Session, and holding that the fishing proprietors might establish by evidence that their rights were injured.

(1) Law Rep. 1 H. L., Sc. 47.
(2) 2 Ap. Cas. 839.
(3) Morr. 12,779.
(4) Shaw & D. 602; 1 Wilson & Shaw, 583.
(5) 11 Macph. (1873) 522.

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The case of *Mather* v. *Macbraire* (1) was also a case of repair of injury caused by a flood. The Court in that case held that the operations complained of

Were performed for the purpose of repairing the damage caused to the bed of the river by winter floods, and floating masses of ice, or otherwise, and of restoring the channel to its former state, and so maintaining the said salmon fishing in a suitable condition for the due and proper use of the nets therein, and otherwise for the due exercise of the rights of the Defender in relation to the said fishing, *and that said operations did not go beyond reasonable repair to the bed of the river.*

The case of *Trotter* v. *Hume*, 9th July 1757 (2) which was referred to at the Bar, had reference to a gallows and ladder erected on an island for the purpose of viewing the fish in the river, and to a bridge between the north bank of the river and the island.

The case is very shortly reported, and I sent for the printed pleadings in the Court of Session to ascertain further particulars. I find that the conclusions of the action were to have it

found and declared that the lower or eastmost boundary of the Pursuer's fishing, and which divides it from the Defender's fishing, was a ford at the east or lower end of the island called *Annabat*—and therefore that the Defender had no right to erect a gallows or ladder upon the east end of said island—nor a bridge betwixt the bank of the river and the island, and therefore that these should be demolished.

The question therefore was as to the *boundaries* of the respective fishings; and whether the portion of the island on which the gallows and bridge had been erected by the Defender was or was not within his boundaries. The Court at first decided that the portion of the island in question was not within the Defender's boundaries, and ordered the bridge to be removed, but on advising a reclaiming petition the Court seems to have found that the island was within the Defender's boundaries, and that he was entitled to maintain the erections he had set up. It was alleged by the Pursuer that the erections were injurious to his rights of fishing, but neither the report of the case nor the pleadings shew what view the Court took on this part of the case. The Salmon Fishing Statutes were not at all referred to. And it therefore appears to me that the case cannot be regarded as an authority in the present case.

I may refer your Lordships to the case of *Viscount Arbuthnott*,

(1) 11 Macph. (1873) 522. (2) Morr. 12,798.

&c. v. *Scott and Others* (1), decided in this House on the 25th of May, 1802. In that case the Appellants were proprietors of salmon fishings in the *North Esk*. Further down the river, and about two miles from its mouth, the Respondents were proprietors of mills on either side of the river. And at this place the Respondent, Mr. *Scott*, had also a right to a salmon fishing, which he was entitled to exercise either by means of cruives or by net and coble. There had been much litigation in regard to a dam dyke for supplying the mills with water, and a cruive dyke immediately adjoining; and in consequence of a judgment of this House in 1772, Mr. *Scott* could no longer use the cruive dyke as a means of preventing the passage of the salmon up the river, and therefore he resolved to abandon that dyke in order to furnish a pretence for erecting another dyke. Accordingly, some years afterwards, he resorted to the plan of erecting a new dam dyke. This erection proved much more objectionable to the fishing than the former from its peculiar construction, it being made of a heap of loose stones, so placed together as to allow the flow of water to filtrate through them, at the same time preventing the possibility of the river from flowing over the top. An action of declarator was therefore raised by Lord *Arbuthnott* concluding to have it found and declared that the Respondents

had no right to erect said bulwark of the extraordinary dimensions above described, and therefore that these new erections ought to be demolished and the said bulwark altogether altered in its dimensions, and of new constructed in such a manner and with such openings or gaps as to admit the free passage of salmon at all times up the river.

The Court of Session assoilzied the Defenders from the conclusion of the action. But this House on appeal altered the judgment, and found

that the Pursuers as proprietors respectively of salmon fisheries in the River of *North Esk* are entitled to have as free access of salmon to their several fisheries as can be had consistently with the rights which others have in the lower parts of the river.

And the House remitted the same back to the Court of Session to have the dyke altered.

Considerable further litigation followed on this remit in the Court of Session; but ultimately the Court found that the dam

(1) 4 Paton's App. 337.

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Lord Gordon.

dyke in question must be of new constructed in conformity to a report by an engineer, by and at the expense of Mr. *Scott*, and be thereafter maintained and supported by him. This judgment was appealed against to this House at the instance of Mr. *Scott;* but was affirmed (1).

I think this case shews that wherever there is in fact what amounts to an obstruction to the passage of salmon, in the sense of Lord *Westbury's* judgment in the case of *Hay* (2), it will be ordered to be removed.

On the whole, therefore, I am of opinion that the operations complained of in the present case exceeded what were necessary for repairing the damage done to the island, and restoring the Respondent's fishings to the condition in which they were before the erection of the *Skibo* embankment. I am of opinion that it is proved that the embankment in its present condition is an obstruction to the "*free and uninterrupted*" passage of salmon up the river; and that it ought to be lowered to the height of the original bank of the island; and that, so far as it extends beyond the end of the island as it existed before the *Skibo* embankment was formed, it should be entirely removed.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 15th April, 1878.

Agent for Appellant: *W. A. Loch.*
Agents for the Respondent: *Markby, Wilde, & Burra.*

(1) 5 Paton's App. 750.

(2) 4 Macq. at p. 542.

[HOUSE OF LORDS.]

DAVIDSON AND ANOTHER, AND ANDREW FLETCHER . . . . . } APPELLANTS;

SIR R. C. SINCLAIR, BARONET, AND ANOTHER RESPONDENTS.

H. L. (Sc.) 1878 April 15.

Teinds—Interim Locality—Augmentation of Minister's Stipend—Claim for Repetition by overpaying Heritor—Prescription.

If one heritor pays a larger and another a smaller share of a minister's stipend, or of any augmentation thereof, than they were respectively by law liable to pay, the under-paying heritor is liable in repetition to the over-paying heritor; but when an under-paying heritor has ceased to be one, either by death or by selling his land, he and his representatives are discharged by the negative prescription after the lapse of forty years from the time when he so ceased, unless the over-paying heritor, or his representatives, take some step within the forty years to interrupt the prescription.

Forty years after heritors, who had never paid any stipend at all, had sold their land and left the parish, a claim for repetition of teinds was brought against them by an overpaying heritor:—

Held, reversing the decision of the Court below, that the long period of negative prescription prevailed, and barred any right to recoupment, notwithstanding the existence of an interim scheme of locality, during the period the non-paying heritors were parishioners.

Weatherstone v. *Marquis of Tweeddale* (12 Shaw, 1) distinguished.

Per LORD SELBORNE:—The claim of the over-paying against the under-paying heritor is one which arises in contemplation of law, and is constituted as a legal cause of action at the time when each over-payment takes place, the law imputing to every heritor an obligation, at that time, to know and to pay the share of stipend properly appertaining to him, whether the amount of that liability was or was not then open to, or the actual subject of, controversy, either in the Teind Court or elsewhere.

THE questions in this appeal were raised upon a special case presented to the Court of Session in April, 1875. The facts of the case are thus substantially stated by Lord *Blackburn*, and also by Lord *Gordon* (1).

The Respondents, designated in the interlocutor appealed against as the first parties, are executors and trustees of Sir *John Sinclair*.

The first set of Appellants, designated in the interlocutor the second parties, are the trustees of the late General *Fletcher*.

(1) See *infra*, at pp. 787, 793.

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The other Appellant, Mr. *Fletcher*, of *Salton*, who is the person really interested, is designated as the third party.

The lands of *Wester Monkrigg*, in the parish of *Haddington*, were, as the name imports, originally abbey lands, feued out *cum decimis inclusis* before the Act of Annexation, and, in consequence of what was long supposed to be a judicial decision of Lord *Fountainhill* (Lord Ordinary), whereby he found, in 1710, that "the said lands in respect of the writs produced, and that they were never in use of payments, could not be liable in any part of the stipend," it was *bonâ fide* believed that *Wester Monkrigg* was teind free, and not liable to pay any part of the stipend of the ministers of that parish.

There were three different augmentations of stipend granted to the ministers of *Haddington*. The first in 1797, the second in 1807. At these dates *Wester Monkrigg* was not the property of either of the Appellants. In 1808 the trustees of General *Fletcher* purchased the lands of *Wester Monkrigg* from a Mr. *Home*, and they continued to hold the lands from 1808 to 1825, when they conveyed the lands to Mr. *Fletcher*.

In 1826 a third augmentation was applied for. A general citation to the heritors was given from the pulpit and on the church door, in accordance with the Acts of Sederunt of 1809, and Mr. *Fletcher* acted on it, and by his agent voted in the election of a common agent for conducting the conjoined processes.

The common agent made out an interim locality, in which he, acting on the belief that *Wester Monkrigg* was not liable to pay any part of the minister's stipend, allocated no part of it on *Wester Monkrigg*, and as a necessary consequence he allocated on the other lands in the parish more than would have been allocated if it had been then known, as it now is, that *Wester Monkrigg* was liable, and Sir *John Sinclair*, the testator of the Respondents, was during the whole period from 1808 to 1833, proprietor of the lands of *Stevenson*, in the parish on which too much was allocated.

Mr. *Fletcher* in 1833 conveyed the lands of *Wester Monkrigg* to Captain *Keith*.

In 1835, two years after Mr. *Fletcher* had ceased to be a heritor in *Haddington*, proceedings were taken to rectify the interim

locality, amongst other grounds, because it exempted *Wester Monkrigg*. As far as that regarded the future from 1833 it concerned Captain *Keith*, and not either of the Appellants; but as far as regarded bygone matters from 1808 to 1825 it concerned the trustees of General *Fletcher*, and as to those from 1825 to 1833 it concerned Mr. *Fletcher* alone, and in some shape or other these two parties (if they were to be bound by the decision) ought to have had an opportunity to defend their interest, but no intimation was ever given to either of them.

Protracted litigation ensued between Lord *Blantyre* and other heritors on the one part, and the Earl of *Wemyss*, who owned some other portions of the abbey lands, and Captain *Keith*, the new owner of *Wester Monkrigg*, on the other.

The result being that the House of Lords in 1844 found, reversing the judgment of the Court of Session, that the proceedings of 1710, which were mainly relied on by Captain *Keith*, were not *res judicata* (1), and a proportion of stipend was subsequently allocated upon the lands by interim schemes of locality prepared in 1853. But it was not until the 22nd of November, 1861, that a final scheme of localities of the stipends which had been awarded in 1797, 1807, and 1826, was approved of. It was then seen that the Respondents had for many years been paying more stipend than they were bound to pay; but no demand was made on the Appellants for any relief until 1875, more than forty years after their connection with *Monkrigg* had ceased, when the Respondents demanded payment from the Appellants in relief of a proportion of the over-payments made by their author in respect of the non-payments by the Appellants of stipend during the time they had possessed the lands of *Wester Monkrigg* from the year 1808 to 1833.

The Appellants pleaded that they were not liable for the sums claimed in respect—

(1) That during the period of their possession the said lands were exempt from liability for stipend by a subsisting judgment of the Court; (2) that the whole rents of the said lands, stock, and teind were received and consumed in *bonâ fide*; (3) that as they have ceased to be heritors in the parish of *Haddington* for more than forty years, all claims against them in that capacity are prescribed.

(1) May 22, 1838; 16 S. 1009, April 22, 1844; 3 Bell's App. 34.

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The opinion and judgment of the Court was craved on the following questions of law:

1. Are the second or third parties, or either and which of them, bound to recoup to the first parties the sum of stipend over-paid by the predecessor of the first parties, and unpaid by the second and third parties, during the period between 1808 and 1825?

2. Is the third party bound to recoup to the first parties the sums of stipend overpaid and unpaid as aforesaid during the period between 1825 and 1833?

The case having been put to the roll, and parties heard thereon, the First Division on the 18th of July, 1877, pronounced the following interlocutor:

The Lords having heard counsel for the parties on the Special Case, find and declare, in answer to the first question, that the second parties are bound to reimburse the first parties the sum of stipend overpaid by the predecessor of the first parties during the period between 1808 and 1825; and, in answer to the second question, that the third party is bound to reimburse the first parties the sum of stipend over-paid by the predecessor of the first parties, and unpaid by the third party, during the period between 1825 and 1833, and decern: Find the first parties entitled to expenses, and remit to the auditor to tax the amount thereof, and to report (1).

On appeal to the House,

March 4, 14, 15. Mr. *E. E. Kay*, Q.C., and Mr. *C. J. Pearson*, the latter of the Scotch Bar (with them Mr. *Henry Davidson*), for the Appellants, contended that the Appellants were in possession of *Wester Monkrigg* from 1808 to 1833, and during that time, and for two centuries and a half previously, the lands had been free from teinds; and in point of fact, no stipend had been allocated on them until 1861. The decree of 1710, which held that *Wester Monkrigg* was free from teinds shewed that the question was strenuously contested. In that litigation, a series of title-deeds dating from 1545 to 1686, were produced, which professed to give immunity from the burden of teinds, containing a grant *cum decimis inclusis*. The Appellants had enjoyed and consumed the whole rents and fruits *bonâ fide*, and were not therefore liable for repetition, until it could be said that they did so *malâ fide*; *Duke of Buccleuch* v. *Hyslop* (2); *Carnegy* v. *Scott* (3); *Brisbane Trs.* (4); *Simpson* v. *King's College*,

(1) Scotch Cases, 4th Series, vol. iv. p. 1126.

(2) March 10, 1824; 2 S. App. Ca. 43.

(3) Dec. 4, 1827; 6 S. 58.

(4) Nov. 28, 1828; 7 S. 65.

Aberdeen (1); see also *Lord Advocate* v. *Drysdale* (2). The Respondents maintain that while *Cuthbert* v. *Waldie* (3) decided that over-payments under a *final* locality admit of no rectification, it was equally settled by *Weatherstone* v. *The Marquis of Tweeddale* (4) that over-payments under an *interim* locality fall to be rectified at the close of the process by an implied judicial contact between the heritors, and that pleas of *bonâ fide* perception will not avail. But the *Weatherstone Case* was quite different from this, here the heritors were not under-paying but non-paying heritors; which was a most important distinction as regards the plea of *bonâ fide* consumption. And there could be no implied judicial contract for repetition of over-paid stipend between the heritors here, who had claimed to hold their land exempt from all teinds, and who had never been parties to any of the interim localities. More than forty years had elapsed since the Appellants had sold their land of *Wester Monkrigg*, and left the parish; this negative prescription was a complete bar to the claim, see *Erskine* (5). *Haldane* v. *Ogilvy* (6) was a claim made for repetition by the minister for arrears *within* the forty years. It was admitted that Mr. *Fletcher* did vote for the appointment of a common agent in 1826, but no stipend was then allocated on his lands, which shewed that every one considered the lands teind free. The actual amount of over-payment claimed was £81 9*s.* 3*d.*, while the interest to the 5th of April, 1875, amounted to nearly three times as much, being £207 7*s.* 7*d.*

They submitted that the Appellants being non-paying heritors, and having had no notice of the litigation of 1835 to 1844, they could not justly be liable in any interest. Therefore, on the fact that the full rental of the land was consumed in *bonâ fide,* the appeal ought to be allowed; but even assuming that the rule in the *Weatherstone Case* applied, it ought to be relaxed, because all claims against the Appellants as heritors of the parish of *Haddington* were prescribed, inasmuch as that they had ceased to hold that character for more than forty years.

(1) June 7, 1809; F. C. vol. xv. p. 296.
(2) Law Rep. 2 H. L., Sc. 369.
(3) Jan. 24, 1840; 2 D. 447.
(4) Nov. 12, 1833; 12 S. 1.
(5) Bk. iii. p. 762.
(6) Nov. 8, 1871; 10 Macph. 62.

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The Lord Advocate (Rt. Hon. *W. Watson*, Q.C.), and Mr. *John Pearson*, Q.C. (with them Mr. *Mackintosh*, of the Scotch Bar), maintained for the Respondents, that the plea of *bonâ fide* consumption did not apply. There was no final locality fixed; if there had been it was admitted that the long negative prescription would have been a good defence.

The parties had been litigating from 1835 to 1861 to get a final decree. Mr. *Andrew Fletcher* by joining in the election of a common-agent in 1826, had put himself in the position of a man who had promised to pay when the final locality was obtained. There was no time within which a final locality must be fixed. Retiring from the parish did not release a heritor from liability for repetition. The doctrine laid down in *Weatherstone* v. *Marquis of Tweeddale* (1), that there was an implied contract between all the parties interested that the over-paying heritors shall have relief from the under-paying, had regulated the practice in teind cases for the last forty-five years and ought not to be upset. The second part of *Cuthbert* v. *Waldie* (2) bears on this case. They submitted that there was no variance between the judgments in the *Weatherstone* and *Cuthbert* cases, Lord *Moncreiff* was the Lord Ordinary in both. The claim for repetition was never considered to arise in the law of *Scotland* until a final locality, then it became a debt, but could not be said to be a debt from the date of the first over-payment. Since 1798, the words *cum decimis inclusis*, without the words *et nunquam antea separatis*, were considered invalid as a grant of exemption: *Colville* (3), see also *Ivory's Erskine* (4); therefore the Appellants, whose title deeds only bore the words *cum decimis inclusis*, had no ground for considering their grant constituted an exemption from teinds. The interest was payable from the date of the first over-payments.

They also cited in their printed case: *Oliphant* v. *Smith* (5); *Forbes* on Tithes, 339; *Easton* v. *Stirling* (6); *Jackson* v. *M'Donald* (7); *Bowman* v. *Henderson* (8); *Stair*, 2, 1,2 4; *Erskine*,

(1) Nov. 12, 1833; 12 Shaw, 1.
(2) Jan. 24, 1840; 2 D. 447.
(3) Nov. 21, 1798; M. 15,707.
(4) Bk. ii. p. 480, note 249, and see cases there cited.
(5) Nov. 30, 1790; M. 1721.
(6) June 25, 1731; M. 1717, affirmed 1 Paton, 90.
(7) M. Appx. *bona* and *mala fides*, No. 3; July 5, 1811; F. C. vol. xvi. p. 318.
(8) June 11, 1805; F. C. vol. xiii. p. 474.

2, 1, 27; *Magistrates of Dunbar* (1); *Moir* v. *Glen* (2); *Cheape* v. *Lord Advocate* (3).

Mr. *E. E. Kay*, Q.C., was heard in reply (4).

(1) 8 S. 128.
(2) 9 S. 744.
(3) 9 Macph. 377.

(4) Their Lordships having requested that information should be submitted to the House as to the manner in which the claim for interest on over-payments of stipend had been disposed of in the case of *Weatherstone* v. *Marquis of Tweeddale* (12th Nov. 1833, 12 S. & D. p. 1), and otherwise as to the decisions and practice of the Court of Session in regard to liability for interest on such over-payments, the following statement was submitted as the result of the joint inquiries of the parties to this case:—

The proceedings in the case of *Weatherstone* above referred to, as preserved on record, have been examined, and it has been ascertained that although the general question of interest was raised in the pleadings, no decision was pronounced upon it. The states which had been prepared by the teind clerk, shewing the over- and under-payments by the different heritors, had been prepared on the footing of stating simple or periodical interest at the rate of 5 per cent. per annum on each over-payment from the date thereof; but it does not appear from the proceedings that this had been approved of or sanctioned by the Court. One heritor in the parish, to whom a sum of £8 17*s.* 4*d.* was due in respect of over-payments during a period of six years, lodged a minute craving the Lord Ordinary to decern for the amount thereof against the under-paying heritors, with interest from the date of the final locality; and the Lord Ordinary decerned for the principal sum of over-payments as contained in said minute, as also for interest thereon at the rate of 4 per cent. from the date of the final locality. Another heritor lodged a claim in the process for the amount of over-payments due to him, with interest, according to the state of the teind clerk, but no judgment appears to have been pronounced thereon.

There having thus in the case of *Weatherstone* been no decision pronounced on the question as to whether an over-paying heritor was entitled to receive interest on the amount of his over-payments from the heritors under-paying, the question came to be discussed in the case of *Buchanan* v. *Buchanan* (15th Nov. 1836, 15 S. & D. p. 7). In that case a state of over- and under-payments had been prepared by the teind clerk, who, in addition to the principal sums, charged the under-paying heritors with interest at 5 per cent., calculated from the dates of the respective under-payments. The question as to whether interest was payable thus came directly before the Court, when it was decided that such interest was payable, but that in the circumstances of the case it should only be exigible at the rate of 3½ per cent. The principle of liability for interest on under-payments appears to have been held as settled by this case, and no question regarding it appears to have been since raised before the Court. Numerous states of over- and under-payments have been prepared by the teind clerk, both under remits from the Court and under agreement of parties, and all such states have been prepared on the footing of charging interest on the under-payments from the

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Their Lordships, having taken time to consider their judgment delivered the following opinions:

April 15. LORD CAIRNS, L.C.:—

My Lords, in this case I propose to state very shortly the grounds for the motion which I am about to propose to your Lordships, for I have had the advantage of being made aware of the opinions which some of your Lordships entertain and are about to express upon the case, and with those opinions I entirely concur.

My Lords, the question arises in this case with regard to lands which are called the lands of *Wester Monkrigg*, in the parish of *Haddington*. Those lands belonged, between the years 1808 and 1825, to one General *Fletcher*, or to his trustees, and the first set of Appellants on the record represent him or them. The same lands, from 1825 to 1833, belonged to Mr. *Andrew Fletcher*, of *Salton*, and he is one of the Appellants, and the person who is

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respective dates thereof, at the rate of 5 per cent., but in some instances a modified rate of interest has been agreed to by over-paying heritors. In the recent case of *Mackenzie* (*Cheape's* factor) against the Lord Advocate, as representing Her Majesty and the Colleges of *St. Andrews*, in which the Pursuer sued the Crown and the Colleges alternatively for a sum in reimbursement of over-payments, including principal and interest, in terms of the teind clerk's state, extending back over a long period of years, no question was raised as to the liability for interest or the rate thereof, and the Pursuer obtained decree against the Colleges for the amount of principal and interest as set forth in the state, and as concluded for in the summons. The liability of the Colleges for the sums decerned for has since been admitted, and a portion of the money has been paid. The teind clerk's state of over- and under-payments in the locality of *Haddington*, to which the present proceedings refer, has been prepared on the same principle, and large payments by under-paying heritors have been made in terms thereof, without any question being raised as to the liability for interest or the rate at which it was charged, and no modification of such interest has been asked by any heritor from whom the under-payments have been claimed.

(Signed)

C. J. Pearson for the Appellants.

W. Mackintosh for the Respondents.

Note.—The Respondents concur in the above statement, subject to the explanation that the question of interest was not argued in the Court below, and that as they (the Respondents) read the special case and the judgment appealed from, the said question was not submitted for the decision of the Court, and is not dealt with in the judgment appealed from.

(Signed) *W. Mackintosh.*

called the third party on the record. In 1833 Mr. *Fletcher* conveyed the lands to a Captain *Keith*, and since that time, that is to say, for more than forty years, Mr. *Fletcher* has had nothing whatever to say to the lands. Between 1808 and 1833 there was an interim locality for the augmentation of the stipend of the minister of the parish, and the common agent allocated in the course of this interim locality no part of the augmentation upon the lands of *Wester Monkrigg*. He and everyone else believed that those lands were exempt from the obligation of contributing to the stipend of the minister. That is now known to be wrong, and consequently the Respondent, Sir *John Sinclair*, or his predecessor, paid more in respect of his lands of *Stevenson*, in the parish, than he ought to have paid, and the case raises the simple question as to the right of Sir *John Sinclair* to recover against the Appellants in respect of the lands of *Wester Monkrigg* the excess, or a portion of the excess, which Sir *John Sinclair* has thus been obliged to pay.

Now, my Lords, of course from the short facts which I have stated, it follows that the year when the lands of *Wester Monkrigg* were sold, the year 1833, was the last occasion in respect of which any right to be recouped for the over-payment fell or accrued to Sir *John Sinclair* in respect of the lands of *Stevenson*, and, *primâ facie*, unless some reason can be shewn to the contrary, it is apparent that, more than forty years having since elapsed, what is called the long period of prescription would bar any right to recoupment which had accrued in that year. But it is said that this period of prescription does not apply in the case of an interim locality for the payment of a minister's stipend, and for this reason :—It is contended that so long as the process of augmentation continues, and is not consummated or terminated by what is called a final locality, so long there is a species of *lis* or litigation proceeding, and that there is what has been termed a judicial contract, which I suppose means an implied contract in the course of judicial proceedings, among all the heritors of the parish, that when the time arrives that the final locality is made, there will be an adjustment among them all as to what really ought to have been the scale of payment between them from the beginning, and that anything which any person may have paid in excess, or

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which any person may have underpaid during that time, will be set right.

My Lords, for that proposition one authority certainly going to that extent has been referred to, and is the foundation of the decision of the Court below, the case namely of *Weatherstone* v. *Marquis of Tweeddale* (1), and in the observations which I am about to make I will assume, although it is not necessary now to decide it, that the principle of the decision in that case is correct and well founded. My Lords, it does not appear to me to apply to the case which is now before your Lordships. It may well be that if there are a number of heritors in a parish going on through a long course of years pending a final locality, each of them making payments which may be termed payments *de bene esse* as it were, those persons all understand and are all to be treated upon the footing that, at the time of the final locality, under-payments and over-payments will be set right. The common agent who conducts the locality may be looked upon as the agent of all those persons, and no final right may be taken as accruing to one as against the other. But what your Lordships have to deal with here is the case of a person who went out of the parish and left the parish altogether more than forty years ago. You may assume that, at the time when he left the parish, he was a person who had under-paid—in this case he had paid nothing at all—and that there might have been a right to make him contribute in that respect the payment which he ought to have made; but, as I said, he left the parish, and became from that moment a stranger to the proceedings, and was no party to the litigation, if there was a litigation; from that time the common agent ceased to represent him. Therefore I am at a loss to see upon what principle it is that, the period of forty years having elapsed, the period after which there is a presumption of the abandonment of every claim having run, there is to be an exception grafted upon that prescription that a person who, as I have said, has become a stranger to the litigation, is after the period of forty years to be held liable. My Lords, he had no power over the litigation, he had no means of expediting it. If that argument is right, it might have gone on for the convenience of the heritors of the parish for

(1) Nov. 12, 1833; 12 Shaw, 1.

a hundred years, and his liability at the end of the hundred years would have been the same. Unless some positive law, or unless some long course of decision were to be produced requiring such a result to be arrived at, I think your Lordships could not, upon principle, arrive at any such result.

My Lords, I am bound to say that I think this view of the case does not appear to have been considered sufficiently, or at all, in the Court below. It appears to me to be quite fatal to the claim which is made by the Respondents; and therefore I submit to your Lordships that the interlocutor of the Court below should be reversed, and that the two questions put in the special case should be replied to by the Court in a manner which would be the reverse of that in which the Court of Session has now replied to them. And, my Lords, I am bound to say that I think this is one of the cases in which the Appellants should have not only their expenses in the Court below, but also their expenses of this appeal.

LORD HATHERLEY:—

My Lords, after the full discussion which took place of this case at your Lordships' Bar, and having also had the advantage, which has been referred to by my noble and learned friend who has preceded me, of seeing the opinions which some of your Lordships are prepared to offer to the House, I shall occupy but a very short time indeed with the observations which I have to make.

My Lords, the case is certainly one of a very singular character and of very considerable importance to those who may have held lands subject to teind, in respect of which long after they ceased to hold those lands a claim of serious amount might be made. It appears that in some cases rather old demands, including interest as well as principal, have been made, and consequently claims of very considerable amount may be made, upon such persons after they have been disconnected with the property in question for a period of more than forty years.

My Lords, as far as I can understand the exact course of procedure in *Scotland* with regard to this question of augmentation and locality of teinds, it seems that the Court of Teinds (the jurisdiction of which is now transferred to the Court of Session sitting as the Court of Teinds) had a jurisdiction, and I believe the exclu-

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sive jurisdiction, for settling the augmentation and the locality, that is to say, settling what was the proper increase to be made to a minister's stipend, and settling, by what is called a locality, a scheme for the apportionment of the augmentation of the stipend so made upon all the heritors of the different lands in the parish, unless those lands were exempt from contributing to teinds. It has been stated in the course of the argument that, although the Court of Teinds settled the locality and settled the accounts between the parties, they had no power to order the payment. The payment as between the proprietors took place in this way. The minister was not to be delayed by any questions as between the several proprietors, that is to say, the parishioners. The minister had a power of requiring payment to be made if he thought fit, wholly by one parishioner, or by two, or by three parishioners, as the case might be, and they had to pay the money which would be adequate to the raising of the stipend, but upon such payment being made by them they had a right to repetition of any sum they might be found to have paid in excess of their proper share, when the final locality came to be made. The consequence of this was that as soon as a stipend had been augmented, localities were arranged for the time being, which had an *interim* character, until all the rights were determined by what is called the final decreet of locality. This appears to have taken place on several occasions in the case we have now before us under appeal. The course of procedure with reference to the arranging of that locality seems to have been this: an agent was appointed for all the different proprietors who took an active part in settling the locality according to the decreet.

My Lords, I just mention these facts to shew how very important it is that we should consider what is the position of the parties in respect of two out of the three localities which are founded upon in the present case. At the beginning of the last century, in the year 1710, now more than 160 years ago, Lord *Fountainhall*, then Lord Ordinary, came to a decision in which he found that the lands as to which the teinds are in question in the present suit, the lands of *Wester Monkrigg*, in the parish of *Haddington*, were exempt from the payment of teind. That does not appear to have been disputed or quarrelled with until a time far advanced in the pre-

sent century, so late as the year 1844, when the House of Lords finally determined that that was an erroneous conclusion (1). In the long period which had elapsed in the meantime between those two dates, these circumstances took place. In 1797 there was a process of augmentation, and an *interim* decreet of locality was prepared in respect of that augmentation in the year 1800. In the year 1807 there was a second augmentation, and a third in the year 1826. At the two latter periods the parties who are now the Appellants, and who are called the second and third parties in the special case, presented to the Court in *Scotland*, under an Act for that purpose (2), namely, General *Fletcher's* trustees, and Mr. *Andrew Fletcher*, were one or other of them undoubtedly in possession of the property. The former of them, General *Fletcher's* trustees, acquired possession in the year 1808, but before any final locality had been made in respect either of the year 1797 augmentation, or of the 1807 augmentation. General *Fletcher's* trustees were in possession from 1808 till 1825, when they made over to Mr. *Andrew Fletcher*, pursuant to their trust, the property in question, and in 1833 Mr. *Fletcher* sold that property.

Now, my Lords, the present Appellants were, beyond all question, not represented in any way, nor were they parties in any way whatever to the two first localities which took place upon the augmentations of 1797 and 1807. There is no evidence whatever of their having been served or dealt with in those proceedings, and one very readily understands how that happened, because the interlocutor or report of Lord *Fountainhall* had been so long acquiesced in that probably it was considered by everybody that they had no part, share, or interest in the localities, and no liability to teinds, and accordingly nothing was done in their presence in regard to the first two augmentations. But with regard to the augmentations which took place in 1826, Mr. *Fletcher*, the gentleman who is called the third party in the special case which was laid before the Judges for their consideration, seems to have been summoned by a process consequent upon an Act of sederunt of 1809, by which service made in a certain fashion at church doors was to be deemed good service. That service was made upon Mr. *Fletcher*, and he joined in the election of the common agent.

(1) 3 Bell's App. 34; 16 Shaw, 1009. (2) *Court Session Act*, 1868, sect. 63.

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In that state of matters I cannot conceive how it could possibly have been held in the Court below that as regards the first two proceedings, to which those who were in possession of this estate were no parties whatsoever, any claim could be maintained. Those who were interested as General *Fletcher's* trustees were no parties whatever to the locality, and I cannot conceive how it can be said that they were to be fixed with the consequences of that locality. Mr. *Andrew Fletcher* is in a different position. Mr. *Andrew Fletcher*, having had the property made over to him in 1825, sold it in 1833, and from that time to the present he has had nothing whatever to do with the property; that is to say, up to the time of the filing of the special case in which, unfortunately, he found himself involved. This special case seems to have been presented within the last year or two, as I think we were told in the course of the argument that the special case certainly was not presented earlier than 1875, a period of more than forty years from 1833, when Mr. *Andrew Fletcher* ceased to have anything to do with the property. My Lords, so things went on under interim localities, coming to no final locality in respect of these augmentations until somewhere about 1835, when a new start took place in the matter in consequence of certain gentlemen then, for the first time, raising the question whether the exemption reported by Lord *Fountainhall* could properly hold. Litigation took place, and ultimately, in 1844, this House decided that that exemption could not hold (1). That having been decided by your Lordships' House, the locality went on, and it was found in the course of that locality (this is admitted in the case) that the Respondents in this case, the representatives of Sir *John Sinclair*, had overpaid in respect of the land occupied by him; and treating *Wester Monkrigg* as now being liable to teind, and to contribute to the locality, a sum was fixed as what was proper to be paid upon *Wester Monkrigg*, and the present case must be taken, as it seems to me, to be in the nature of an action of repetition on the part of Sir *John Sinclair's* representatives to be paid that portion of the stipend which he overpaid, and which ought to have been paid in the years from 1808 to 1825 by General *Fletcher's* representatives, and in the years from

(1) *Lord Blantyre* v. *Earl of Wemyss*, 22 May, 1838, 16 Shaw, 1009; 22 April, 1844, 3 Bell's App. 34.

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1825 to 1833 by Mr. *Andrew Fletcher*, one of the Appellants in the present case.

My Lords, I said advisedly that it appeared to me that this special case was in the nature of an action of repetition. As I stated at the outset it appears, and this was conceded on all sides during the argument, that the Court of Teinds was not the proper place to award payment, but that the proper way to obtain payment after a final decreet of locality had been made would be by proceeding for that payment in the Common Law Courts in *Scotland* (if I may be excused for so terming them), to obtain repetition of that money which had been so paid in excess by one of the parties to the locality.

Now, my Lords, comes the real point of the case, upon which I shall leave more to be said by my noble and learned friends who will come after me. I have read their opinions, and I have quite satisfied myself that in those opinions I can safely concur. The point is how far the negative prescription can in any case take place with reference to a locality of teind. It is said that it cannot do so on the ground that in the case of *Weatherstone* v. *Marquis of Tweeddale* (1) it was decided that all parties who enter into an arrangement for the appointment of a general agent, and into an arrangement to have a locality settled and adjusted for the apportionment of teinds payable to a minister, are supposed to enter into an agreement by which they agree that whatever may take place in the meanwhile, whatever over-payments may be made by *A.*, in respect of which he is to be reimbursed by *B.*, those over-payments ought to be reimbursed when the final decreet of locality is made; that is, it is said, if steps are taken in reasonable time for that purpose by the parties to the litigation; but however that may be, all parties are supposed to undertake that irrespective of all questions with regard to time, with regard to prescription and the like, and irrespective of all questions as to the *bonâ fide* receipt of rents and profits, which are also held to be concluded by this entering into a final locality, the parties are supposed to agree, notwithstanding all those questions, that when the final locality is adjusted and settled they will pay those sums which have been overpaid by other proprietors.

(1) Nov. 12, 1833; 12 Shaw, 1.

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My Lords, whatever may have been said in that case of *Weatherstone* v. *Marquis of Tweeddale* (1), in order to apply it to a case like the present, I should have expected to find facts similar to those existing in the case upon which such observations were made; and I find nothing at all comparable in the state of circumstances in the case now before your Lordships for decision, to the circumstances in the case of *Weatherstone* v. *Marquis of Tweeddale* (1). In the first place there is the fact upon which I have already commented, that in the present case, with regard to the first two augmentations, the parties upon whom the claim is now made really were not parties to the litigation at all, and to say that a man is to be supposed to have bound himself by an agreement, that at the end of a certain litigation he will make such and such payments when he has never been a party to the litigation at all, appears to me to be quite contrary to reason and justice; and without any authority contradicting what seems to me to be clear reason and clear justice, I could not come to a conclusion here that, at all events as regards the first two augumentations, these Appellants had any part or concern in the matter whatever, or were at all bound by anything that was done therein.

As regards the third, a somewhat different question presents itself, but even as regards the third I am at a loss to understand how a person who in 1833 parted with the property altogether, and at a time when the right to the exemption had not been questioned, when nothing had been done to inform him that such was the case, could be held to have been bound by a litigation, or a question, which was going on in the meantime with regard to the adjustment of a locality in which he was not and could not be summoned, because he was not an owner at the time when the question began. The question raised in 1835 as to this exemption, was between certain parishioners and the person to whom Mr. *Andrew Fletcher* had disposed of the property, and with whom he had no concern. I cannot understand how the person to whom he sold the property can be said to have acted as his agent, so that he could be held to be bound by any supposed engagement that he, at the end of this locality whenever it might take place, which was not apparently for a very long time afterward, would

(1) Nov. 12, 1833; 12 Shaw, 1.

hold himself responsible both for all the back payments, and for the interest upon them. According to one of the cases that was referred to here, that, it appears, would be the consequence if he was responsible at all; he would have to be responsible for both the principal and the interest which might be found to have been underpaid during those years, in consequence of the supposed exemption of the estate from liability.

My Lords, it does not appear to me that the case of *Weatherstone* v. *Marquis of Tweeddale* (1) can be in any way compared with this. There, the question was between parties who were heritors who had all paid teind, and the only question was as to the period of time from which that payment should be made; it was not a question of liability to teind altogether. In this case your Lordships have it first of all decided behind the back of Mr. *Andrew Fletcher*, who was not a party to all the proceedings that were carried on after 1833, that his land, which had been held for more than 100 years to be exempt from teind, was to be made liable to teind, and in addition to that, that he was to be called upon after he had ceased for more than forty years to be the owner of the estate, as being liable for back payments. That is an extremely strange proposition, and I cannot readily bring myself to think that it can be the law. I have not examined the law in detail, because it will be more fully expounded by the opinions of others of your Lordships who took part in hearing this case; but I have satisfied myself that it would be in every respect contrary to the ordinary principles of justice that a claim of this kind should be sustained, as to the delay of which for the long period in question there is really no reasonable excuse, that I can see, offered, and as to which if it were to affect this gentleman it would be affecting him by a supposed obligation on his part to conform to the final decision in a matter in which he had no part or lot whatever.

LORD SELBORNE:—

My Lords, I am of opinion that in this case the defence of prescription ought to prevail. The special case was presented to the Court of Session more than forty years after the last of the pay-

(1) Nov. 12, 1833; 12 Shaw, 1.

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ments, repetition of which was sought by it from the Appellants, and also more than forty years after the Appellant, *Andrew Fletcher*, had ceased to be a heritor of the parish of *Haddington*, by the sale and conveyance of the lands of *Wester Monkrigg* to Captain *Keith*. The Appellants, *Davidson* and *Fraser*, had ceased to be heritors of that parish, and the latest payment of which repetition was claimed against them had been made eight years earlier; the earliest payment included in the claim having been made above sixty years before the commencement of these proceedings.

It is settled by the law of *Scotland* that if one heritor pays a larger and another a smaller share of a minister's stipend, or of any augmentation thereof, than they were respectively by law liable to pay, the underpaying is liable in repetition to the overpaying heritor. So far, the law seems clear; though the ground of that liability is not stated in the same way in all the authorities. In the recent case of *Haldane* v. *Ogilvy* (1), it was laid down that the claim of an overpaying against an underpaying heritor is

> Strictly and simply a claim of debt; a claim for money advanced by the creditor for the debtor at a time when their respective pecuniary liabilities were misunderstood.

And it was added, that

> The claim of the minister for his bygone stipends is precisely of the same kind.

In a still later case, *Mackenzie* v. *The Lord Advocate* (2), it is thus explained:

> The claim of the minister for payment of his stipend is a claim which the law gives him against the heritors of the parish; against the party who holds the land, and who is answerable for the teind. . . . In a case where the heritor has not paid his debt to the minister, the claim subsists against him; and that claim is, according to the practice of the Teind Court and of this Court (the Court of Session) held to be transferred to the overpaying heritor, so as to prevent an unnecessary circuity of action; and the overpaying heritor thus comes to be the creditor of the underpaying heritor; he comes, as it were, in place of the minister, in making that demand; but the demand must be made against the party who is in default, who ought to have paid and did not pay.

I am not sure that I correctly understand what is meant by "the practice of the Teind Court" in this passage, because it is

(1) Nov. 8, 1871; 10 Macph. at p. 69.

(2) *Scottish Reporter*, vol. xv. at p. 323.

admitted, and it seems to be beyond dispute, that the Teind Court has no jurisdiction, either at the end of any process of locality, or at any other time, to make any decree, declaratory or otherwise, as to the liability of one heritor to another in respect of any past over-payments or under-payments, or to take any back account between them: repetition, when it is due, can only be sought and obtained by means of a separate action against each underpaying heritor in the Court of Session. This, however, does not affect the statement of the principle of the claim. In an earlier case, that of *Dawson* v. *Pringle* (1), which seems to be the leading authority for the allowance of interest on over-payments of this kind, a view was taken, apparently not consistent with the doctrine laid down in *Haldane* v. *Ogilvy* (2). The Lord President (with whom the majority of the Judges agreed in allowing interest, the suit being by the minister for arrears of stipend), thought—

> That this was not properly a question of debt; that there was no giving of credit, no borrowing, it was a case of intromission; that teinds originally belonged to the clergy, and were drawn by them; that afterwards the heritor got a right of drawing his own teinds, but under the condition that he should pay the minister's stipend; that, to that extent, the heritor is an intromitter with the estate of the clergy; that interest, therefore, must be due on these intromissions as it is on all intromissions, &c.

It would seem to follow, if this were the correct principle, that the defence of *bonâ fide* consumption ought, in a proper case, to be available to an underpaying heritor against a claim of an overpaying heritor, or of the minister, which, however, was denied by Lord *Benholme* in *Haldane* v. *Ogilvy* (2). Such a defence was allowed (as against a claim for repetition, going behind a final locality which had been reduced and wholly set aside) in *Cuthbert* v. *Waldie* (3), and in the case of the *Magistrates of Montrose* v. *King's College, Aberdeen* (4). I do not profess to be able to reconcile all that was said and done in all these cases; but it appears to me to be consistent with them all to hold that the claim of the overpaying against the underpaying heritor is one which arises in contemplation of law, and is constituted as a legal cause of action at the time when each overpayment takes place, the law imputing

(1) June 15, 1808; Faculty Coll. vol. xiv. p. 195.
(2) Nov. 8, 1871; 10 Macph. 62.
(3) Jan. 24, 1840; 2 Dunlop, 447.
(4) Ibid. at p. 457, in note.

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to every heritor an obligation, at that time, to know and to pay the share of stipend properly appertaining to him, whether the amount of that liability was or was not then open to, or the actual subject of, controversy, either in the Teind Court or elsewhere. On no other view would it be possible that each overpayment should carry interest from the time when it was made, which seems always, since 1808, to have been assumed; and which, in 1836, was judicially determined in *Buchanan* v. *Buchanan* (1), (a case between heritors), mentioned in the joint supplementary statement made to your Lordships since the close of the argument.

In *Weatherstone* v. *Marquis of Tweeddale* (2) repetition was claimed by an overpaying against an underpaying heritor for more than forty years before the commencement of the action, going behind a final decree of locality, which had been afterwards reduced and set aside. The Defender pleaded prescription, and also *bonâ fide* consumption; and, though more was said as to the latter plea than the former, both defences were repelled by the Court. This decision, so far as it carried back the liability beyond the date of the reduction of the final decree of locality (without which, the question of prescription would not have arisen, for that final decree was reduced in 1792, and the action was brought within forty years after that date), cannot, in my opinion, be reconciled with the later cases of *Cuthbert* v. *Waldie* (3), and *Magistrates of Montrose* v. *King's College, Aberdeen* (4); nor was the attempt to explain it, on that point, which was offered at the Bar, satisfactory to my mind. Even, however, if the authority of *Weatherstone* v. *Marquis of Tweeddale* (2), on this question of prescription, stood higher than, under these circumstances, it appears to me to stand, it would still not be an authority applicable to the present case. The grounds of that decision were stated in the interlocutor of the Lord Ordinary, which was (so far) affirmed by the Inner House. After declaring in effect that the final decree of locality of 1789 had been converted into an interim decree by the reduction of 1792, he found

That where payments of stipend are made under interim decreets of locality, there is an implied judicial contract *among all the parties*, that when the legal

(1) Nov. 15, 1836; 15 Dunlop, 7.
(2) Nov. 12, 1833; 12 Shaw, 1.
(3) Jan. 24, 1840; 2 Dunlop, 447.
(4) Ibid. at p. 457, in note.

obligations of the heritors shall be determined by final decreet, their several interests shall be adjusted from the commencement of the process or processes, according to the true state of their rights and obligations; and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed:

and that it was

Admitted on the record, *that the condescenders or their authors were parties to the proceedings, in the several processes of locality referred to:*

to which it was added,

That no party, being a singular successor in lands, could claim relief in respect of overpayments made by his authors, unless he had a special assignation thereto.

The hypothesis thus laid down, of a "judicial contract," was treated by Lord *Benholme*, in *Haldane* v. *Ogilvy* (1), as "somewhat artificial," and as a "narrow, if not mistaken, view of the subject":—a criticism which certainly detracts somewhat from the authority of *Weatherstone* v. *Marquis of Tweeddale* (2). And it does seem difficult to suppose that there can be an implied "contract" to make restitution to heritors who may eventually appear to have paid too much, by any one who has never paid, or admitted his liability to pay, anything at all; and, who, until a late stage of the proceedings, was treated by every one as under no liability. Perhaps, however, this question may be one more of words than of substance. What was really meant probably is, that, as between the parties or actors who were before the Teind Court in a process of augmentation and locality, a right to a future adjustment of such payments as might be made under an interim decree was implied from the very nature of their *concursus* in that proceeding, by which they were all bound; and that the dependence of such a process between them would keep that right alive until a final decree.

The doctrine, so explained, seems to be applicable to those only who have been throughout, or at the very least within forty years before action brought, parties to the locality proceedings;—which, in the present case, none of the Appellants were. I do not think it consistent with the principle of any of the authorities on this subject to hold, that the cause of action is, in any case of this kind, originally *constituted* by the final decree of locality; and it would

(1) Nov. 8, 1871; 10 Macph. 62. (2) Nov. 12, 1833; 12 Shaw, 1.

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certainly be inconsistent with all principle to hold that it was, or could be, so constituted, as against persons who (like the Appellants in the present case) were at the date of the final decree, and had been for many years previously, strangers to the locality proceedings. When the Appellant, *Andrew Fletcher*, sold his estate in 1833, and ceased to be a heritor, he became a stranger to those proceedings, and had no longer any power (as I apprehend) to intervene in them for any purpose. If the Respondents had desired to enforce such liability as he may have been then under to them, and with that view to bring the locality proceedings to a close, it was for them to do so. In point of fact, they allowed twenty-eight years to elapse, after *Andrew Fletcher* had ceased to be a heritor, before obtaining a final decree of locality (1). That period was not, in itself, sufficient for prescription; but they allowed the full time of prescription afterwards to run out, by waiting for fourteen years more, before presenting this special case (2).

Andrew Fletcher, as a heritor (though denying his liability to pay any part of the minister's stipend) was a party, from 1826 to 1833, to the locality process under the third decree of augmentation dated the 26th of June, 1826. To the two preceding processes, under the augmentation decrees of 1797 and 1807, he had not been a party; and the other Appellants were never in any way parties to any of the three processes.

The law, as to parties to such proceedings, in thus stated in Sir *James Connell's* book on Teinds (3):

> The Defenders called in processes of augmentation are usually the titulars and heritors. It has been always held to be a good objection, that any of the parties interested were not called.

Even in 1870 it was deemed necessary (as appears from the Fourth Report of the Scottish Law Courts Commissioners, p. 16),

> In libelling any summons of augmentation, modification, or locality of stipends, that the titular and tacksman of the tiends, heritors, life-renters, and all others having interest in the teinds of the parish, should be called *nominatim* as Defenders to the action.

Down to the act of sederunt of the 5th of July, 1809, personal citation of, or service upon, all such parties appears to have been

(1) 1861. (2) 1875. (3) 2nd Ed. vol. i. p. 457.

indispensable to make any proceedings in which they did not intervene effective against them. That Act provided that "in future, instead of the old mode of citation," it should be competent for the Pursuer to cite all persons interested by a publication of notice in church, from the precentor's desk, on three successive Sundays, followed by the exhibition of the same notice on the church doors, and by three advertisements in certain newspapers. By this mode of citation *Andrew Fletcher* was brought into the process of 1826. But, with respect to the two earlier summonses of 1797 and 1807 (by which alone the other Appellants could be affected), no such mode of citation was available; and it is expressly stated in the special case, that

> The proprietor of the lands of *Wester Monkrigg*, at the date of the summonses upon which the first two decreets followed, was not called as a party under those summonses, and he is not mentioned either in the rentals given in by the ministers, or in the rentals approved by the Court.

It appears to me that the peculiar circumstances of this case were not, in the Court of Session, sufficiently distinguished from those of the earlier authorities; and that the interlocutor under appeal ought to be reversed.

LORD BLACKBURN (having stated the facts of the case (1), proceeded):—

My Lords, in the elaborate and able judgment delivered by the Lord President, he deals with the first and second grounds on which the Appellants rested their case. But singularly enough he does not, nor do any of the other Judges, even mention the third ground taken by them. And yet it would seem that this objection lies on the surface. The silence of the Judges on this point is accounted for from their thinking that the point had been concluded by authority since the decision of *Weatherstone* v. *Marquis of Tweeddale* (2), now forty-five years ago; and assuming (perhaps from the point not being pressed before them) that this was so generally agreed by the practitioners in *Scotland* that it was unnecessary to say anything about it. My Lords, I need hardly say that the opinion of the profession, on any matter of

(1) *Ante*, at p. 765.

(2) Nov. 12, 1833; 12 Shaw, 1.

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every-day occurrence on which they are continually asked to advise, is a very weighty authority. A Court of Appeal should be cautious before determining that a decision, frequently considered and always acquiesced in, was wrong. And if from the time which has elapsed, and the nature of the point (as, for instance, a point in conveyancing law), there is reason to believe that rights have been regulated and arrangements as to property made on the basis of the decision, it may be right to uphold it, even though convinced that it was originally wrong. In such cases the maxim "*Communis error facit jus*" applies. But the occasions on which practitioners have had to consider at what time the negative prescription bars a claim for repetition for over-payment of stipend against a person who has ceased to be a heritor must be rare. In the present case the advisers of Lord *Blantyre* in 1835 seem not to have thought that the first and second parties had any further concern with the locality after ceasing to be heritors. And I doubt very much if there has been even one other case in which the question could have arisen during the forty-five years that have elapsed since *Weatherstone* v. *Marquis of Tweeddale* (1). I think, therefore, that your Lordships should examine that case and say what it decides, and whether it is a good decision, much as if it had been decided last year.

My Lords, I now return to the general question of negative prescription:

> The principle," says Mr. *Bell* in his Commentaries, "of the long negative prescription of forty years is different from that of the short prescriptions. It is not a prescription of payment, but a prescription of abandonment not to be overcome, but available to the debtor as equivalent to a discharge. But the term of prescription may be interrupted, either by minorities or by the methods appointed for that purpose (2).

In the ordinary case of several persons being liable to pay money, and one of them being compelled to pay more than his share, the co-obligants are bound according to their interests to reimburse him; but I do not think it doubtful that, when forty years have elapsed from the time when the over-payment was made, the negative prescription is a good defence, unless there has been something to interrupt it. Now the different teind owners

(1) Nov. 12, 1833; 12 Shaw 1. (2) 7th Ed. at p. 352.

are all jointly to the extent of their teinds liable to the payment of the augmentation of stipend. One of them may be forced to pay the whole, and then he has a right to be reimbursed by the others according to their interests. This was decided as long ago as 1664 in *Hutcheson* v. *Cassillis* (1). At that time interim localities had not yet come into practice. *Primâ facie* the forty years would begin from the date of the overpayment. It may be that the pendency of an interim locality alters all this, and that the person who has overpaid is obliged to wait till the final locality is settled, and that, *per contrà*, the person who has not paid enough is not discharged till forty years after that final locality is settled. The settling of the final locality may be long delayed; in the present case we see that it was sixty-three years from the granting of the first augmentation. So long as the same persons, who were heritors when the proceedings commenced, continue to be heritors, it may very well be said that they ought not to complain of the delay which is their own; they could press on the making of the final locality. This is forcibly stated by Lord *Shand* (2). But when the parties are changed, either by death, or by selling their property, this is no longer the case. To explain what I mean, I will suppose the facts to be slightly different from what they are. Let us suppose that, instead of Mr. *Fletcher* obtaining power to sell *Wester Monkrigg*, he had died in 1833, and the lands had fallen to the heir of entail; his personal representatives could not, after his death, be said to be represented by the common agent; and let us suppose that the death of Sir *John Sinclair* (the date of which I do not know) had taken place in the same year, 1833; the lands of *Stevenson* then passed to his heir: the right to be reimbursed would not have passed to his heir, but to his personal representatives, and that right to be reimbursed would have been not against the heir of entail of *Wester Monkrigg*, but against the personal representatives of Mr. *Fletcher*. The personal representatives of Sir *John Sinclair* could not, as such, in any way that I can see, hasten the settling of the final locality; and it would be very hard, both on them and on the beneficiaries, if the personal representatives of Sir *John* were obliged to delay the final winding-up of the estate for an uncertain period, which as it turns out was

(1) Morr. 14,788; Stair, p. 316. (2) Scotch Cases, 4th Series, vol. iv. p. 1126.

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twenty-eight years, and might have been much longer. Yet unless they were under an obligation so to wait, they were *valentes agere* against the representatives of Mr. *Fletcher* from the time of Sir *John Sinclair's* death, and from that date at latest the forty years would begin to run.

Again, in the supposed case the personal representatives of Mr. *Fletcher* were in no ways parties to the subsequent litigation. Perhaps they could have been made so by some citation; I do not say how that may be. If they could be so their liability could probably be kept alive by a citation renewed from time to time; but unless that was done the personal representatives would *primâ facie* be entitled to rely on the negative prescription, as equivalent to a discharge at the end of forty years from the death of Mr. *Fletcher*. It would be hard on them if their liability was to be prolonged till forty years after the final locality was settled by a litigation to which they were not parties, and which might be very protracted. Indeed, it is easy to suppose a case in which the final locality would never be settled at all; after the death of one of the underpaying proprietors the chief heritor might buy up all the rest of the parish. This is not all likely to happen in such a parish as *Haddington*, but in a small rural parish it would be far from improbable, and I daresay has happened. In such a case the interim locality would remain undisturbed, for the only person who could disturb it, the now sole heritor, would not have any interest to do so.

I do not say that those considerations are enough to shew that the existence of an interim locality does not interrupt the negative prescription, but I do say that those who say it does ought to prove their doctrine, either on principle or by authority. It seems, as I have already said, to have been tacitly assumed by the Judges below that the point was concluded by authority.

On principle, I do not see how such a doctrine can be supported. I am sorry to be obliged to enter upon the question of principle without any assistance from the Judges below, but I am bound to do so.

The Commissioners of the Teinds Court were originally a different body altogether from the Court of Session. They had

jurisdiction to decree augmentations and to local them on the several teind owners, but they had no jurisdiction in any way to interfere as to the repayment of money.

Had the Earl of *Cassillis* in 1664 (1) sought reimbursement he must have gone to the Court of Session. He would there have had to prove, as part of his case, the proportions in which the different teind owners were liable, the very question which was pending in the locality before the Teind Commissioners. There would have been nothing that I am aware of to prevent the Court of Session from trying this question for themselves; but it would be proper, in order to avoid the expense of two litigations and the possible scandal of contradictory decisions, to suspend the suit before them till the determination of the other suit, if that could be done on equitable terms. And when and so long as the parties to the proceeding in the Teind Court remained the same as those in the Court of Session, the equitable terms would seem to be that payments should be made of what was admittedly due (which is much the same as acting on an interim locality, though interim localities seem not to have come into use till many years after 1664, the date of *Hutcheson* v. *Cassillis* (1)), and that the residue should abide the event of the proceeding in the Teind Court. I do not know whether this was in fact ever done in such cases, but it seems so reasonable that I think it probable that practitioners would at least expect that the Court of Session would so act. Since the Union the jurisdiction of the Teind Court has been exercised by the Court of Session, but it is still a separate jurisdiction. Now in cases where such would be the course which the Court of Session would pursue if they were appealed to, the parties had no object in appealing to them. It would not, I think, be unreasonable to imply at least an understanding between the parties that they were to go on the terms which they all knew the Court of Session would impose upon them; and this, even if no more than an understanding, would be an important element in considering the question of *bonâ fide* perception and consumption. I doubt whether there would be a sufficient ground for implying a contract such as would interrupt the negative pre-

(1). Morr. 14,788; Stair, p. 316.

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scription even whilst the parties were the same. Perhaps in such cases the maxim "*Communis error facit jus*" might apply. But that it is unnecessary in the present case to determine.

It would, I think, be not reasonable to imply a contract to wait after they had ceased to be the same parties.

But if instead of the Earl of *Cassillis*, who was a party to the proceeding for the locality, bringing the suit, we suppose that he was dead, and that the suit was brought by his personal representatives for the benefit of his widow and daughters, whilst the new Earl, who might be a distant cousin, was the person who inherited the land, and so was a party to the locality, I do not see how it could be equitable to the Countess and the Ladies *Kennedy* to stay their action till the determination of a suit over which they had no control, and still less to oblige them to be bound by the result of a litigation which was entirely *inter alios;* and the remark would have more force if the Defenders, or some of them, had by death or otherwise ceased to be parties.

It would be no easy task to say, in such a case, what, if any, would be equitable terms on which to stay the suit; and it is not likely that such cases were sufficiently numerous to establish a practice. I do not, therefore, see what grounds there can be for implying any contract in such cases.

The Judges below, as I have already observed, do not enter on the question on principle at all. They tacitly assume that it is decided by authority, and principally by the decision of *Weatherstone* v. *Marquis of Tweeddale* (1).

I had at the end of the argument been strongly impressed with the belief that neither that nor any other case in Scotch law decided the point now before your Lordships. I had meant to consider further before finally making up my mind on that subject; but having had an opportunity of perusing the opinion of my noble and learned friend on my left (Lord *Selborne*) I am quite satisfied I am relieved from examining the authorities, or saying more than that I completely concur in the view which he takes (2).

All that it is necessary to decide in this case is that when an underpaying heritor has ceased to be one, either by death or by selling his land, he and his representatives are discharged by the

(1) Nov. 12, 1833; 12 Shaw, 1. (2) *Ante*, at p. 781.

negative prescription after the lapse of forty years from the time when he so ceased, unless the overpaying heritor, or his representatives, take some step within the forty years to interrupt the prescription. I am satisfied of this on principle for the reasons I have above given; and I am satisfied that there is no sufficient authority on decided cases to justify a decision contrary to principle.

If the demand for the principal is discharged, no question arises as to the interest.

I, therefore, entirely concur in the proposed judgment.

LORD GORDON (having stated the facts of the case):—

I am of opinion with your Lordships that the judgment of the Court of Session is not well founded, and that it must be reversed. Their Lordships in the Court below founded their judgment on the case of *Weatherstone* v. *Marquis of Tweeddale* (1), which has been already referred to by your Lordships, in which it was found

That *where payments of stipend are made* under *interim* decreets of locality, there is *an implied judicial contract* among all the parties that, when the legal obligations of the heritors shall be determined by final decreet, their several interests shall be adjusted from the commencement of the process or processes according to the true state of their rights and obligations; and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of a final locality may have been delayed.

I think the principles involved in the judgment in that case were right, but I think that these principles do not apply to the present case. In that case all parties concerned had been parties to the process of locality, and it was in *that* process of locality that *by consent of the parties* (as specially set forth in an interlocutor of the Court) the question arose and was decided. In that case the question arose as to *under* payments by certain of the heritors who were parties to the proceedings; and in these circumstances, I think that the Court rightly held that there was an implied contract that the underpaying heritors should, when the true state of the accounting was ascertained, make good to the overpaying heritor the sum which he had overpaid. In every case where payments are made under an *interim* scheme of locality all parties paying know that the interim scheme is liable to rectification, and

(1) Nov. 12, 1833; 12 Shaw, 1.

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that when the rectification is made by the *final scheme* they are liable to be called upon to pay up any deficiency which they may have been paying prior to the rectification. And I think that the questions of *bonâ fide* perception, or *prescription*, could not fairly be raised by any such underpaying heritors. But I think the circumstances of the present case are different from those of the case of *Weatherstone*. In the first place, it is admitted here, that at all events prior to 1826 the proprietor of *Wester Monkrigg* was not a party to the proceedings, and although he seems in that year to have voted in the election of a common agent, yet his name was not on the record in the process, and it was assumed by all concerned that he was not liable for any of the stipend; and no objection was made to his exemption from stipend during all the time that he was proprietor of the lands. And in the second place, there is this wide difference between the case of *Weatherstone* and the present, that whereas in that case the Court was dealing with parties who had all along paid stipend, but paying less than they were bound to pay, in the present case the heritors against whom the claim is now made *never paid stipend at all*. They had not only never paid stipend, but it was not pretended by any of the other heritors that they were liable in payment.

I think, therefore, that there was not and could not be in this case any *implied contract* between the Appellants and the other heritors such as there was found to be in the case of *Weatherstone;* and that the principles applied in that case are inapplicable to the present.

I concur with your Lordships in thinking that the claim maintained by the Respondents has been cut off by the negative prescription; and I do not think it necessary to consider the other pleas maintained by the Appellants. I have had the advantage of seeing and considering the judgment which has been delivered by my noble and learned friend Lord *Selborne* (1), and I concur in his views in regard to the plea of prescription. I shall not, therefore, detain the House by again going through the authorities on this subject.

I concur in the judgment proposed to be pronounced by your Lordships.

(1) *Ante*, at p. 781.

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Judgment of the House:—Ordered and Adjudged, That the said Interlocutor of the Lords of Session in *Scotland*, of the First Division, of the 18th of July, 1877, complained of in the said appeal, be, and the same is hereby reversed: And it is declared, That the two questions put in the Special Case should be answered by finding that the Second Parties are not bound to reimburse the First Parties the sum of stipend overpaid by the predecessor of the First Parties from 1808 to 1825, and that the Third Party is not bound to reimburse the First Parties the sum of stipend overpaid by the predecessor of the First Parties and unpaid by the Third Party from 1825 to 1833: And it is Ordered, That there be paid to the Appellants their expenses in the Court of Session: And that the Respondents do pay to the Appellants the costs incurred by them in respect of the appeal to this House.

Lords' Journals, 15th April, 1878.

Agents for Appellants: *Simson, Wakeford, & Simson.*
Agent for Respondents: *W. A. Loch.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1878 *April* 15.

CHAMBERS AND OTHERS . . . . . APPELLANTS;
SMITH AND OTHERS . . . . . RESPONDENTS.

Trust—Settlement—Unlimited Discretionary Power of Trustees to postpone Payments—Arrestment by Creditors ineffectual to bar the exercise of the Trustee's Power.

Where trustees have an unlimited discretionary power to postpone, as long as they think fit, the payments of shares of a residuary fund; and where of the *time* and *manner* of exercising the power they are to be the sole and final judges, arresting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees.

A testator directed his trustees to hold the residue of his estate for the behoof of his children, "with and under the modifications to be afterwards stated." The shares of residue were to vest at the testator's death, and be payable six months after his decease; but powers were given, "notwithstanding the period above appointed for payment of the shares of the residue," to the trustees "to postpone as long as they should think it expedient to do so, the payment of the provisions or shares of residue in the case of all or any of the children or grandchildren . . . and to apply the interest or annual

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produce of the same during the period of the postponement, to or for behoof of such children or grandchildren, or, by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees . . . . so that the children and granchildren, or any of them, as the case might be, might draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as the trustees might fix, and that the capital might be settled on or for behoof of such children or grandchildren, and their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as the trustees in their discretion might deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they should be the sole and final judges."

The trustees during a period of five years after the testator's death paid the whole of the interest, and a part of the capital of his share to *J. C.*, a son of the testator. Subsequently judgment creditors of *J. C.* used arrestment in the hands of the trustees against the balance of the residue of his share still due to *J. C.*, and raised an action of forthcoming. Thereupon the trustees executed a deed restricting the right of *J. C.* to a life rent, and settled the fee on his children; and again by another deed they resolved to hold the balance, and apply the interest as an alimentary fund for *J. C.'s* behoof:—

Held, reversing the decision of the Court below, that the arrestment could not in any way abridge the ample discretionary powers of the trustees; and that the trustees were at liberty to withhold from *J. C.*, or any one claiming under him, the payment of either principal or interest as they might think occasion required.

Per LORD O'HAGAN:—The *mere* declaration of the trustees' resolution to postpone, however made, is sufficient to render the fund unattachable by creditors.

THE following abstract of the facts and pleadings is taken from the opinion of Lord *Hatherley*, and also from that of Lord *Blackburn*:—

The Appellants in this case are the trustees under a testamentary disposition of the late Dr. *Robert Chambers*, one of the partners of the firm of *W. & R. Chambers*, publishers in *Edinburgh*; and the Respondents constitute a firm of sharebrokers at *Sheffield* who claim to be creditors for a sum of £2294 1*s.* 10*d.* on account of principal and interest due on three bills of exchange and 4*l.* 6*s.* costs, as against *James Chambers*, one of the sons of the testator Dr. *Robert Chambers*. The Respondents have by due process obtained judgment (1) as against *James Chambers* their debtor, and have proceeded to arrest in the hands of the above trustees all funds belonging to *James Chambers*, and by an action of forth-

(1) 10 June, 1878; Ex. D. at Westminster.

coming and payment commenced in September, 1876, sought to render available the arrested funds for payment of their claims.

The trust disposition of Dr. *Chambers*, dated the 10th of November, 1870, after appointing his eldest son *Robert Chambers* and others (now represented by the Appellants) trustees for executing the trusts of the deed, and making several dispositions of property, disposed of the residue in the following words:

Lastly, in regard to the residue of my means and estate remaining after fulfilment of the foregoing purposes of this trust, I appoint my trustees to hold, apply, pay, and convey the same, and the interest and other annual produce thereof, to and for behoof of the children of the marriage between me and Mrs. *Anne Kirkwood* or *Chambers*, now deceased, equally among them, with the exception of my son, the said *William Chambers*, and with and under the exceptions and modifications to be afterwards stated, payable in the case of such as are major six months after my decease, declaring that the whole provisions in favour of my said children shall at my death vest in those surviving me . . . . and notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to and in the power and option of my trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so the payment of the provisions or shares of residue hereinbefore provided as aforesaid in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of the postponement to or for behoof of such children or grandchildren, or, by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorized to appoint), with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren, and their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as my trustees in their discretion may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges.

The testing clause of the settlement was as follows (1):

In witness whereof, I have subscribed these presents (but with and under this express provision, and declaration, *videlicet*, that the whole of the legacies, annuity, and provisions made and provided by this disposition and deed of settlement shall be strictly alimentary, and shall not be arrestable or attachable for the debts or deeds of the persons in whose favour the same are conceived, or any of them, nor be subject or liable to the diligence of their creditors), at *St. Andrews*, upon the 10th day of November, in the year 1870, before these witnesses, &c.

(1) As to the effect of this testing clause, see opinion of Lord *Gordon*, *post*, pp. 827, 830.

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James Chambers, the debtor, is one of the children. Dr. *Chambers* died in March, 1871.

The trustees realized the property of the testator, with the exception of his business, and a paper was put in, admitted by both sides to be correct, in which the result of an examination of the trust account was set out. That account shewed that up to the 1st of June, 1875, the trustees paid to Mr. *James Chambers* sums of money considerably exceeding the amount of income on his share, his share of income to that date being stated as amounting to £2272 6*s.* 3*d.*, and his total receipts to £4358 19*s.* 7*d.*, so that £2086 13*s.* 4*d.*, the overpayment, was charged to capital. He was further paid £474 17*s.* 2*d.* for income up to the 31st of March, 1876, and 150*l.* on account from that date to the 6th of July, 1876, leaving a balance of about £3000 due to *James Chambers*, being more than sufficient to cover the Respondent's debt.

In the trustees' defence to the action of forthcoming, in the condescendence the third answer originally stood as follows :

> Admitted that the Defenders, the arrestees, had not at the date of the arrestments, and have not since, executed any deed under their hands with reference to the share of the Defender Mr. *James Chambers* in his father's estate. Admitted that a balance of the Defender's share of residue is yet in the hands of the trustees. Explained that the amount of said balance has not yet been ascertained, but believed that it will probably be equal to the amount of the Pursuer's debt. *Quoad ultra* denied, and explained that the trustees have thought it proper, and have resolved, to postpone the payment of the said balance, and to pay the interest only to Mr. *James Chambers* for his aliment, as provided in the trust-deed.

After the action of forthcoming was raised, but before it was decided by the Lord Ordinary, the Appellants executed a deed of trust in favour of themselves for behoof of the said *James Chambers* and his children. This deed was dated the 10th, 13th, and 16th of January, 1877, and recited the main provisions of the testamentary disposition, including the attesting part of that instrument and the provision contained in the attesting clause as to the legacies being alimentary and not arrestable, and further stating that considering the payments already made to *James Chambers*, and that his share of the estate under their management was not more than was required as a suitable alimentary provision for himself and his family, they (the trustees) had deemed it fit to retain

the balance for the behoof of himself and his children as authorized by the settlement, and in manner after-mentioned they declare that the share shall remain vested in them the trustees in trust only for the behoof of *James Chambers* during his life, and after his death for behoof of his children (naming them), and that so long as the said provisions shall be retained they shall remain vested in the trustees, and *James Chambers*, or his children, shall only be entitled to receive the interest or other proceeds during his and their lives, and that at such times and in such proportions as they the trustees might deem expedient.

By a second trust deed, dated the 6th, 9th, and 10th of July, 1877, they again recited the will, and expressly by this deed declared that the share of *James* should be in trust for him in life-rent for his life-rent alimentary use, and after his death for his children. The Respondents, the arresting creditors, seek to obtain a decree of forthcoming to the extent of the debt due to them in respect of the interest and principal in the hands of the trustees under Dr. *Chambers'* testamentary disposition at the date of the process of arresting. The question is whether they are so entitled either as to principal or interest moneys, or any part thereof respectively.

The pleas in law for the Pursuers (Respondents) were:

1. The Defender, the principal debtor, being due and owing to the Pursuers the sums contained in the said extract judgment, the Defenders, the arrestees, are liable to account to the Pursuers for the said principal debtor's funds in their hands, in terms of the conclusions of the summons.

2. Assuming that the declaration introduced into the testing-clause of Dr. *Chambers'* settlement is effectual to constitute an alimentary provision, the Defender's share of residue is attachable to the extent of the surplus in excess of a reasonable alimentary annuity.

3. In any event, the Pursuers are entitled to have their arrestments made effectual to the effect of giving them a preference over the fee, or reversion of the said share of residue, subject to the burden of the Defender's life interest.

The second and third pleas stated for the Defenders (the Appellants) were as follows:

2. Upon a sound construction of the said trust disposition and settlement, the trustees are entitled to retain in their hands the share of residue belonging to the said *James Chambers*, and to apply the interest of the same as an alimentary fund for his behoof.

3. The said trustees not being bound to pay the principal of the said share of

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residue to the said *James Chambers*, either now or subsequently, the Pursuers are not entitled to any decree of forthcoming.

The Lord Ordinary (Lord *Young*) by his interlocutor, dated the 22nd of February, 1877, sustained these two pleas for the Appellants, and dismissed the action.

The Respondents took the case by reclaiming note to the First Division of the Court. Their Lordships of that Division (on the 17th of July) allowed the record to be amended by the addition of the statement by the trustees of the execution of the said two deeds of trust of January and July, 1877, before-mentioned.

The case was debated before their Lordships on the 20th of July, and also on the 18th of October, by one counsel on each side, with a special view to the application and effect of the declaration in the testing clause, and thereafter further heard on the 9th of November, 1877, when a judgment was pronounced recalling the interlocutor of the Lord Ordinary (Lord *Shand* dissenting), and directing payment to the Respondents of £2294 1*s.* 10*d.* and £4 6*s.* out of the share of *James Chambers* and his children (1).

The Lord Ordinary's note to his interlocutor was not before the Judges of the Inner House.

On appeal to the House,

March 21, 25, 26. Mr. *E. E. Kay*, Q.C., and Mr. *J. C. Nicolson* (of the Scotch Bar), for the Appellants, contended that upon a sound construction of the trust settlement they had power at *any time* before actual payment of the shares of residue to exercise the powers of retaining the capital of such shares, and of settling the same; and as to the manner and mode of doing this they were the sole judges. The trust settlement throughout exhibited an anxious desire on the part of the testator to guard against the effect of imprudent conduct on the part of the beneficiaries. The arrestment in question could only attach the common debtor's (Mr. *James Chambers*') right *tantum et tale*, as it stood in his person, and therefore subject to the exercise of the powers of retention and settlement conferred on the Appellants. The rule of law that where a right has vested it may be attached by diligence, and that after diligence had began nothing which subsequently occurred could

(1) Scotch Cases, 4th Series, vol. v. p. 97; *Scottish Reporter*, vol. xv. p. 58.

alter the rights of parties as then existing, had no application to this case, because the interest which had vested in the common debtor was not an absolute interest, but was one of which it was an inherent quality that it should be subject to the exercise of the powers given to the trustees and the subsequent exercise of those powers was a contingency to which the arrestment was subject. A right not reduced to possession, and subject to defeasance at the will of trustees, was quite as conditional as a right which was in suspense until some condition was purified, therefore, the Appellants having exercised the powers of retention by the deeds of January and July, 1877, were not bound to make any portion of the common debtor's share forthcoming to the Respondents. On the construction of the trust settlement and powers of the trustees under it, they cited and commented on *Weller* v. *Ker* (1); *Whitworth's Case* (2); *Trappes* v. *Meredith* (3); *Hunter* v. *Hunter's Trustees* (4); *Balderston* v. *Fulton* (5); *Erskine*, b. 3, tit. 6, sect. 11; *Wickham* v. *New Brunswick and Canada Railway Company* (6); *Watts* v. *Porter* (7); *Eyre* v. *M'Dowell* (8); *Kinderley* v. *Jervis* (9); *Duncan* (*Croom's Trustees*) v. *Adams* (10). And as to aliment see *Monypenny* v. *Earl of Buchan* (11); *Lewis* v. *Anstruther* (12); *Smith* v. *Innes* (13). [On the contention that the Appellants were entitled to read as part of the trust settlement the declaration in the testing clause to the effect that, the whole of the provision should be strictly alimentary, they also cited *Johnstone* v. *Coldstream* (14); *Dunlop* v. *Greenlee's Trustees* (15); *Kelso, Petr.* (16)].

Mr. *Southgate*, Q.C., and Mr. *R. T. Reid*, contended for the Respondents, that *James Chambers* had at the date of the arrest-

(1) Law Rep. 1 H. L., Sc. 11; 4 Macph. (H. of L.) 8; 38 Scotch Jur. 256.
(2) 3 Hare, 416; aff. 1 Ph. 728.
(3) Nov. 3, 1871; 10 Macph. 38; 44 Scotch Jur. 25.
(4) March 10, 1848; 10 D. 922; 20 Scotch Jur. 326.
(5) Jan. 23, 1857; 19 D. 293; 29 Scotch Jur. 143.
(6) Law Rep. 1 P. C. at pp. 75, 76.
(7) 3 El. & Bl. 743.
(8) 9 H. L. Cas. at p. 642.
(9) 22 Beav. 1.
(10) Nov. 30, 1859; 22 D. 45.
(11) July 11, 1835; 13 S. 1112.
(12) Dec. 17, 1852; 15 D. 260.
(13) May 29, 1855; 17 D. 778.
(14) June 30, 1843; 5 D. at p. 1309; 15 Scotch Jur. 541.
(15) Nov. 2, 1863; 2 Macph. 1; aff. June 2, 1865, 3 Macph. H. L. 46.
(16) March 8, 1850; 12 D. 918.

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ment a vested right to payment of the share of Dr. *Chambers'* residue held by the trustees for his behoof; and the effect of the arrestment was to attach the balance as his absolute property. No resolution or deed postponing payment or declaring that they retained the residue had been come to by the trustees *before* the date of the arrestment, on the contrary during the four years after the testator's death the trustees had paid large sums to *James Chambers;* and therefore the trustees had thus decided to hold the balance of the residue as vested in *James Chambers* absolutely. The institution of the action of forthcoming rendered the fund litigious, and no change could afterwards be made in the rights of parties, therefore the second deed of July, 1877, executed after the case had been decided in the Court below, and which deed divested *James Chambers* of the fee and transferred it to his children, was of no avail. The deed executed in January during the dependence of the action was *ultrà vires* of the grantors. But assuming even that the trustees had the power to execute that deed after the date of the arrestment they had no power of revocation; the power once exercised could not be revoked, unless expressly reserved, and that was not done: *Sugden* on Powers, 8th ed., 909, Appx.; case of *Hele* v. *Bond* (1); *Worrall* v. *Jacob* (2); therefore whatever might have been the wish of the trustees they had by the true construction of the terms of the *January* deed given irrevocably to *James Chambers* an absolute right to draw and receive the interest during his life, and consequently the Respondents were entitled to have at the least that life interest. To create a fund alimentary technical words must be used: *Bell* cites two cases, 7th ed., vol. i. p. 125, *Lord Kilcaldron* v. *Lord Balgillo* (1639) (3); *Gordon* v. *Blackburn* (1697) (4): but there were no words strictly technical in the will itself, and the testing clause could not make a deed alimentary which was not so already, and the deed of July was of no avail, the power having been previously exercised in executing the previous deed of January. The declaration in the testing clause to the effect that the legacies and the provisions should not be arrestable was improbative and ineffectual. The purpose of the testing clause

(1) Prec. Chan. 474; 1 Eq. Ca. Abr. 342.
(2) 3 Mer. 256; Sugden on Powers, 8th Ed. p. 369.
(3) M. 10,372.
(4) M. 10,294.

was to state the particulars of the execution of the deed; and it was filled up almost invariably *after* the deed had been subscribed. If the declarations affecting the subject-matter of the deed could competently be inserted in the testing clause the effect of a deed as it stood when subscribed by the grantor might be entirely changed without his knowledge, and the deed nevertheless be probative. The cases of *Johnstone* (1), *Dunlop* (2), and *Kelso* (3), did not bear out the Appellant's contention; and on the contrary *Arnott* v. *Kedder* or *Calder* (4), referred to by Lord *Deas* (5), was strongly adverse to the introduction of substantial provisions in the testing clause. As to the functions to which the testing clause is limited: see *Bell* on "Testing of Deeds," pp. 43, 44, 124. They also cited *Stair* v. *Stair* (6).

Mr. *E. E. Kay*, in reply.

LORD HATHERLEY (having stated the facts as above):—

My Lords, I will first consider what is the true construction of the testamentary disposition of Dr. *Chambers* as regards his residuary estate.

I think that it is carefully and anxiously worded so as to give the trustees the largest powers over that residue until actual distribution of the respective shares. They are to "*hold, apply, pay,* and *convey* the same and the interest thereof to and for the behalf of" his children by his late wife equally among them, except his son *William Chambers,* and with, under, and subject to the exceptions and modifications to be afterwards stated.

These modifications will apply to the whole gift, and will modify the interest of every one of the children in that gift. He declares the provision to be payable to such as are major six months after his decease, but in the case of his daughter *Alice* on her attaining majority or being married, declaring that the whole provisions in favour of his children should at his death be vested

(1) June 30, 1843; 5 D. 1297.

(2) Nov. 2, 1863; 2 Macph. 1; aff. June 2, 1865, 3 Macph. (H. L.) 46.

(3) March 8, 1850; 12 D. 918.

(4) 12 S. 781; 13 S. 619; aff. 1 Rob. App. 183, 208.

(5) Scotch Cases, 4th Series, vol. v. p. 116; see Lord *Deas'* judgment also for various cases on this point.

(6) 5 S. & D. 449; reversed, 2 W. & S. 614.

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in their surviving issue. He then makes provisions for the issue of any child dying in his lifetime to take their parents' share, excepting his son *William's* issue. Then follows the most important clause. He declares that—

> Notwithstanding the periods above appointed for the payment of the shares of residue of his moneys and estate, he provides and declares that it shall be lawful to and in the power and option of his trustees, if they see cause and deem it fit, to postpone as long as they shall think it expedient to do so, the payment of the provisions or shares of residue therein provided in the case of all or any of his children or grandchildren, and to apply the interest or annual produce of the same during the period of the postponement to and for the behoof of such children or grandchildren.

Now, stopping here, we find a power in the trustees overruling all directions for payment and vesting before given, and directing them during the postponement to apply the interest for the behoof of the children. This must mean that the child is to have no control over the fund at all when the trustees resolve on postponement. If he could demand payment the power of postponement could be pleaded, and if any child were to take legal proceedings to enforce payment into his own hands of the money, it appears to me that, if any meaning is to be given to this clause, it would be a good plea to an action against the trustees for payment of the principal and interest, and they might say, "We have postponed such payment to you personally, and intend ourselves to apply the money for your behoof."

But the case does not rest there, for the trustees may by the will either do this, or by a deed under their hands may retain the provisions or any of them vested in their own persons, or vest the same in the persons of other trustees, whom they are authorized to appoint, so that the children and grandchildren or any of them, as the case may be, will receive only the interest or other annual proceeds of their respective provisions during their lives, or for such times as the trustees may fix, and the capital may be settled on or for the behoof of such child or the grandchildren and their lawful issue, on such conditions and under such restrictions and limitations, and at such times and in such manner as the trustees may in their discretion deem most expedient, of which expediency and the time and manner of exercising the powers and option thereby given, they should be the sole and final judges. Powers

are also given to the trustees for settling accounts as to the partnership business in which Dr. *Chambers* was engaged with his surviving partners in winding up the estate generally.

Now, what is the effect of these two clauses together? It was said in argument before your Lordships that the option was a single option between two courses; that the positive direction was for vesting and payment to the children, but that the trustees might postpone the payment and retain the funds, paying the income to the beneficiaries, or for their behoof, on the one hand, or they might at their option execute a deed giving a life-rent only to the testator's children or grandchildren on the other, and that this option should be declared and acted once for all at the time when payment became due, and this view seems to have received some countenance in part of Lord *Deas'* judgment (1).

My Lords, it is an ordinary incident to a power that it may, unless controlled by some provisions of the instrument in which it is contained, be exercised at suitable periods as to portions of the property until the subject-matter of the power is exhausted, and here it seems to me a necessary construction that the power should continue to be exercised from time to time as required. The testator evidently contemplated a discretion in his trustees, for which reason he gives them the option of retaining the moneys and applying them, with their own hands as it were, to the use of the children, or of executing a deed by which they may appoint others to undertake the same duty for the future; and though by such deed the life-rent is to be given to a child, and the principal to his issue, yet it may be given with such restrictions and conditions and for such uses as the trustees in their discretion may deem most expedient, of which expediency and "the time and manner of exercising the power and option they are to be the sole and final judges."

I do not know any form of words which could more precisely confer on them and those who might succeed to the trust the power at any time of discharging their duty in the distribution of the testator's residue amongst his children and their issue in the manner which they should think proper. The scheme of the testamentary disposition is this: either pay to my children and grandchildren

(1) Scotch Cases, 4th Series, vol. v. p. 104.

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their shares (if they be of age) or hold in your own hands the share of any of them and apply it for his or her behoof instead of paying it to the child.

It appears to me that so long as the trustees retain any part in their own hands they are bound to employ it as they think best for the legatee's benefit, viz., either by paying it at any time they think fit to the legatee, or by paying it in his behoof, that is for his benefit, in such manner, and at such time, as they may think proper. This, by the law of *Scotland*, they could well do.

It will be noticed that in these observations I do not refer to the clause of attestation and the directions therein contained.

What then is the position of the trustees when a creditor seeks to arrest the fund in their hands, payment of which they have not yet made? They hold it in trust for the legatee, but subject to the powers conferred on them by the will. And with great respect, I conceive it to be a leading misconception in the judgment of the Court below that they have held that the arrestment can in any way affect the powers of the trustees, even, as the learned Judges have thought, to the extent of annihilating their trust.

Now, I understand, my Lords, the law of *Scotland* to be in no way different from that of *England* with reference to the effect of an arrest of a debtor's interest in the hands of third parties. It has been long settled in *England* that a judgment creditor must take his debtor's interest subject to all charges and modifications to which it is subject in the debtor's own hands, or as it is called "*tantum et tale*," otherwise there would be an act of the debtor conferring an interest on his creditor which he could not acquire for himself. The debtor, *James Chambers*, could not, I think, in the case before us, insist on payment to himself of any principal moneys or interest the payment of which the trustees under the powers contained in the testamentary disposition thought right to postpone; and for the same reason the arresting creditor cannot make that demand. The trustees might under the will, if they thought fit, pay any given creditor for necessaries, or take any other course to them appearing advisable for the benefit of the legatee, but could not be compelled to pay it as the legatee may direct.

What I have said applies to the position of the parties under the testamentary disposition alone, but by the two subsequent

deeds I think the trustees have finally settled the disposal of the shares by giving a life-rent to the children and making it an alimentary provision for them.

The maxim "*pendente lite nihil innovandum*," seems to me to have no place here. If I am correct in holding, as I do, that the trust powers could not be destroyed by the objects of them becoming indebted, which, indeed, seems the time at which the testator would have desired them to be brought into action, then the trustees are not innovating, but only exercising their rights as conferred upon them by their truster at their own discretion.

It appears to me that under the ample terms of the discretion so conferred, they are at liberty to withhold from *James Chambers*, and from any claiming under him, the payment of either principal or interest, as they may think occasion requires, and that by the operation of the deeds they only limited this their power, which was general, as to the times and manner of its exercise, as they themselves, being sole judges, conceived to be expedient.

This view precludes the necessity of entering upon the somewhat vexed question of law that arises on the attestation clause of the testamentary document. This was held unanimously by the Court below to be incapable of being treated as a provision of the deed. After the cases cited before us as having been decided by this House, I should have taken more time to consider whether I could wholly acquiesce in the decision of the Court in *Scotland* on this point, but, for the reasons above mentioned, I am of opinion that the interlocutor of the First Division, complained of by this appeal, should be reversed, and that we should remit the case to the Court of Session, in order that they may assoilzie the Defenders from the conclusions of the action with expenses.

No question will arise as to income since the last payment made, for the view I have taken extends both to income and principal till actual payment. Neither can there be any doubt that the first of the two deeds executed by the trustees, reciting, as it does, what they at least supposed to be part of the testator's will as contained in the testamentary clause, rendered the provision in life-rent thereby made itself alimentary.

No authority has established that the word "alimentary" must be used, and in this case, the machinery of the testamentary dis-

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position in effect empowers the trustees to deal with the property as they think best for the sole benefit of the legatees.

LORD O'HAGAN:—

My Lords, in this case there is no controversy as to the facts; and they, and the documentary evidence, have been so fully and clearly stated by my noble and learned friend that I shall not waste any time by detailing them again.

The question is, as to the effect of the arrestment, and it must be determined by a consideration of that proceeding, in connection with the trust deed of Dr. *Robert Chambers*, the answer of his trustees to the third condescendence of the Respondents, the deed of January, 1877, and the deed of July, 1877.

In the Courts below there seems to have been some distinction taken between the extent of the interests of the debtor and the creditor using legal diligence, and some attempt to contend that the right of the latter may be something different from, and higher than, that of the former: but, on this point, the judgment of Lord *Shand* seems to me conclusive; and your Lordships are relieved from the necessity of considering it, at all, by the frank admission of the Respondents' counsel that the creditor cannot take more than the debtor had. If he have a vested property and an absolute claim they will of course pass from him, but if the property and the claim are subject to conditions and liable to be affected by the discretionary action of other people, the creditor cannot escape the fulfilment of the conditions or deny the effect of that exercise of the discretion, which would have bound the debtor. We have therefore, simply to determine what was the nature of the estate taken by *James Chambers* under the testamentary deed, and what has been the operation upon it of the several acts of the Respondents to which I have referred? The purpose of Dr. *Chambers*, in settling his property, appears to me manifest on the face of the deed.

He had an interest in a large publishing business. He did not contemplate the immediate or the speedy cessation of it. It has, in fact, been continued for the benefit of his partners and his family; I suppose with changing fortune, as the amount of profit seems to have altered from time to time. It was desirable that

his trustees should have such powers as would enable them to maintain, to regulate, or to terminate it as might promote the interests committed to their care. Again, Dr. *Chambers* had several children, some of whom were of age and some were not; and in settling his estate he plainly had in view this possibility—that it might be proper to deal with them differently, according to the different circumstances which might arise; to have regard to their character, conduct, and necessities, and to control the disposition of their several portions in such a way as might most conduce to the benefit of each. The present position of the son with whose property this appeal is conversant, demonstrates that the father had good reason for such anticipations; and only exercised a prudent forethought if he took care to guard against the probable consequences of the folly, or improvidence, or misfortune of his family.

These purposes seem to me as clearly indicated by the passages of the trust-disposition, which have been read by my noble and learned friend, as if they had been, in terms, recited in the commencement of it. It is our business, from the whole instrument, to ascertain the real intention of the settlor, and, having done so, to my own satisfaction, I proceed to consider whether it has been carried into effect by apt and sufficient words?

After making various provisions for various people, in regard to the residue, the settlor appoints the trustees, "to hold, apply, pay, and convey the same, and the interest and annual produce thereof, to and for the behoof of the children equally" (with one exception), "payable in the case of such as are major" (of whom *James Chambers* was one), "six months after his decease, with a declaration that the whole provisions in favour of the children, shall at his death vest in those surviving him." But all this is to be "with and under the exceptions and modifications to be afterwards stated;" and those exceptions and modifications are very clearly expressed, and without limit in their operation on the whole trust estate. He had made the portions payable six months after his death, and expressly provided for the vesting of them; but he goes on to say, that, "notwithstanding the periods above appointed for the payment of the shares of the residue, it shall be in "the power and option" of the trustees, "if they see cause and

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deem it fit to postpone as long as they shall think it expedient to do so," the payment of those shares "in the case of all or any" of his children or grandchildren; and to apply the interest or annual produce of the same during the period of postponement, to and for the behoof of such children or grandchildren." And then he declares, that the trustees, at their discretion, may retain the shares "vested, in their own persons," or vest them in other trustees whom he authorizes them to nominate, with all their own power, including the power of appointing factors, so that his children or grandchildren, or any of them, may receive only the interest of their respective provisions during their lives, or for such time as the trustees may fix, the capital to be settled on them or for their behoof, "on such conditions and under such restrictions and limitations, and for such uses," as the trustees may deem expedient, "of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be sole and final judges."

I observe upon this, that the settlor must have contemplated a continuance of the trusts and of the powers committed to the trustees for an indefinite and a lengthened period. They were to "hold" the residue, and "retain" it for themselves or any other trustees whom they could appoint at their absolute discretion, and the "vesting" recognised, in the children and grandchildren could only be a "vesting" *sub modo*, and subject to their control, inasmuch as they were empowered to vest the estate "in their own persons" or those of their nominees, for the purposes of the trust. The provisions are wholly inconsistent with the contention that, at the end of the six months, or at any period before the actual payment of the several shares, the authority of the trustees as to the time and mode of distribution of the property was intended to be taken away.

The words of the deed seem to me to give the trustees absolute power to postpone any payment to any of the beneficiaries at any time, before the funds have been disbursed, and the exercise of that power was to them not only a right but a duty to be performed as long as they continued to hold their fiduciary capacity. They were to observe the condition and the fluctuations of this property; they were to observe the conduct, the character, and

the wants of the *cestuis que trust*, and, according to their view of these matters, they were to exercise the authority and option confided to them in the time and the manner of which they were to be the "sole and final judges."

In this way the settlor provided that his purposes should be carried into effect, and the result was that the beneficiaries took an estate vested in them and, if the trustees thought proper, to belong to them absolutely at the periods indicated; but it was a qualified estate to be enjoyed by them only on the conditions and at the times which the trustees, in their uncontrolled discretion, should appoint.

It seems to me, that the arrestment could not possibly affect this condition of things. What the debtor had, was attached for the benefit of the creditor; what he had not, the arrestment could neither give them nor take from him. It could not make the estate absolute, which was qualified. It could not take from the trustees the power which enabled them to deny its liability to attachment. What was his could be taken; what was not his, if the trustees intervened and exercised their right and duty to postpone, could not—"*Tantum et tale*," as it was, and as he could claim it for himself, it might pass to his creditor or assignee: but no process of a Court could give to him or them that to which he was not legally entitled.

In this respect there is no distinction between English and Scottish law, and both of them are in accordance with reason and justice. *James Chambers* could not have forced his trustees, against their judgment and in disregard of their duty, to pay him, at once, the money the payment of which they deemed it expedient to postpone; and his creditors can have no higher right. Neither the debtor nor the creditor can be permitted to disregard the direction and defeat the purpose of the settlor of the property.

No special mode of postponement is prescribed by the deed of trust. The manner, as well as the time and the conditions of it, was left to their discretion; and the declaration of their resolution to postpone, however made, was sufficient for the purpose. Three several times they declared that resolution; still holding the residue, as soon as the creditors made a legal demand, they answered to the third condescendence that, "the trustees have

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thought it proper, and have resolved to postpone the payment and to pay the interest only to Mr. *James Chambers* for his aliment, as provided by the trust deed;" adding, that, "the interest will be no more than sufficient for the said *James Chambers*' aliment." This, in my view, would have been of itself sufficient to bar the claim of the creditors, but it was followed up by the deed of January more formally setting forth the same resolution, and again by the deed of July, with the same object and effect.

Your Lordships have heard much argument as to the deed of January and its alleged operation in giving *James Chambers* a right to the benefits of his share without the continuing control of the trustees, who did not reserve in it any power of revocation. This view would make the deed of July, which uses the unequivocal words, "for his life-rent alimentary use,"—not employed in the deed of January—of no avail as an answer to the Respondents' claim. But looking carefully to the terms of the deed of January, although it might have been made more clear, as was that which followed it, I think that its recitals, its statement that the share of *James Chambers* is not more than "a suitable alimentary provision for himself and his family," and its provision that the interest only should be drawn at such times and in such proportions as the trustees might deem expedient, are conclusive against the reasoning of the Respondents. I agree with my noble and learned friend that no technical words are necessary to carry out the designs which, from these passages and the circumstances of the case, we must believe the trustees to have had at heart; and the deed, therefore, seems to me abundantly sufficient, as an exercise of this power, to prevent the operation of the arrestment, even if, as I do not conceive it to have been, any further exercise of it was needful for that purpose after the declaration of their resolution to postpone, which they have made in the pleadings. In this view your Lordships do not require at all to consider this deed of July.

Neither do I think that the delay of making or declaring the resolution until after the institution of proceedings, diminishes its force or affects the rights of the parties. The power of the trustees was to continue until they had actually parted with the shares, and the exercise of it was made necessary by those very

proceedings which gave the first occasion for such interference as the settlor had manifestly intended them to make. As the arrestment could not invest the debtor with any interest he had not before, it could not take from the trustees the power rightly or wrongly committed to them and legitimately called into action by the arrestment itself. This view must, I think, have been adopted by the Court below when, by its interlocutor of the 17th of July, 1877, it allowed the amendment of the record which put in issue the two deeds executed after the raising of the action. Without reference to them, however, as I have said, this answer to the third condescendence appears to me sufficient to sustain the Appellants' case.

Therefore, my Lords, holding that the intention of the settlor is clear, that this power given to the trustees was ample to carry that intention into effect, that their action was within the scope of that power, and that it was validly executed, I am of opinion that the appeal should be allowed, and the interlocutor of the First Division of the Court of Session reversed with costs.

In the view I have taken, it is wholly unnecessary to decide the question raised as to the testing clause of the trust deed, and therefore, I give no opinion upon it.

LORD BLACKBURN (having stated the facts of the case, proceeded):—

My Lords, the judgment of the Court below was adverse to the opinion entertained by Lord *Shand*, who says:

I am unable to concur in the proposed judgment, being of opinion, with the Lord Ordinary, that the trustees of the late Dr. *Chambers* are entitled, under the powers conferred by his settlement, to retain the money to which the Pursuers, as creditors of Mr. *James Chambers*, maintain they have acquired right, and to apply the interest or proceeds towards the maintenance of Mr. *Chambers* and his family. In the view I take of the case it is unnecessary to decide any question as to the effect of the provision in the testing-clause which declares the annuity, legacies, and provisions left by Dr. *Chambers* to be alimentary (1).

In this opinion of Lord *Shand* I agree: I will, without expressing any opinion as to the effect of the provision in the testing-clause, and treating the deed as if no such provision was there inserted, consider what is the true construction and legal effect of the clause, beginning with the word "lastly (2)."

(1) 4th Series, vol. v. at p. 119. (2) *Ante*, p. 797.

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The deceased appointed his trustees "to hold, apply, pay, and convey the residue of his estate to and for the behoof of his children" (of whom *James Chambers* was one. His share has now been ascertained to have been somewhat more than £5000) "with and under the exceptions and modifications after stated, payable" in the case of such as are majors (which *James Chambers* was) "six months after my decease, declaring that the whole provisions in favour of my said children, shall, at my death, vest in those surviving me," and *James Chambers* did survive him. Had the deed stopped there it would have been too plain for doubt that the provision for *James Chambers* was his to dispose of as he would from the time of Dr. *Chambers'* death, and that as soon as the six months had elapsed he could have compelled the trustees to pay him both principal and interest. But (after some provisions as to children who died in his lifetime leaving issue and minors, which do not affect *James Chambers*), the trustee proceeds to state "the exceptions and modifications" in the following terms:

> And notwithstanding the periods above appointed for the payment of the shares of the residue of my means and estate, I provide and declare that it shall be lawful to, and in the power and option of my trustees, if they see cause and deem it fit, to postpone, as long as they shall think it expedient to do so, the payment of the provisions or shares of residue hereinbefore provided as aforesaid, in the case of all or any of my children or grandchildren, and to apply the interest or annual produce of the same during the period of postponement to or for behoof of such children or grandchildren; or by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees (whom they are hereby authorized to appoint), with all or any of the powers, privileges, and exemptions belonging to themselves, including the power of appointing factors, so that my children and grandchildren, or any of them, as the case may be, may draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as my trustees may fix, and that the capital may be settled on or for behoof of such children or grandchildren, or their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as my trustees, in their discretion, may deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they shall be the sole and final judges.

My Lords, I shall not occupy time by examining critically the words of this clause, which has been sufficiently done in the Court below. The words are not very artistically chosen, but I think there can be no doubt that the intention of the truster, Dr. *Chambers*, was that his trustees should have "a power and option

if they see cause and deemed it fit," to postpone the payment of *James Chambers*' share, and to apply the interest during such postponement to or for behoof of *James Chambers*.

He probably had two motives, one was that a large part of his means being in a business, it might be inconvenient to give his children or their creditors power to insist on the withdrawal of those means from the business at the end of six months from his death, and if the postponement was for that reason only, it would be right to pay the interest of the share *to* the child. The other motive was, that he feared that his children or some of them might prove spendthrift; in that case the trustees might postpone the payment whilst they were considering whether they would exercise the further power of settling the fee on the issue, and giving the spendthrift child only a life interest. Indeed in any case some time must elapse before such a deed could be prepared, and during that time at least the payment must be postponed. And whilst it was postponed for such a purpose it would not be desirable to pay the income to the spendthrift, but to *apply* it for his behoof. I think it probable that if the present case had been suggested as a possible one to Dr. *Chambers*, and he had been asked whether it was his intention that the income should during the postponement be swallowed up by the *Stock Exchange* creditors, leaving *James Chambers* and his family penniless, he would have said, "By no means. I have given my trustees discretion to apply it for his behoof, and they will exercise that discretion by paying the household and necessary expenses first before paying anything to either *James Chambers* or his creditors. If after doing so, there is anything over, *James Chambers* and his creditors may do what they like with it." But it was for the trustees and the trustees alone to decide how the discretion was to be executed. The truster declares in the most explicit language that—of the expediency and the time and manner of exercising the powers and option given to his trustees "they shall be the sole and final judges."

My Lords, where a truster gives discretionary powers to be exercised by his trustees, in order to protect the interests of others, the trustees are bound to exercise their discretion, and cannot in general deprive themselves by anticipation of the power to do so:

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Weller v. *Kerr* (1). In the present case, however, the terms of the trust are such that the trustees might properly pay the whole or part of the share at the end of six months or any subsequent period; and they in fact did pay a part, and as to that part their discretionary power was gone. It was argued at your Lordships' Bar that the trustees must either retain and settle the whole fund, or none. No doubt there may be and often is a trust where from the nature of the subject-matter and the objects of the trust, or otherwise, it appears to be the intention of the truster that the whole shall be kept together as one entire thing. But here the fund is in its nature divisible, and the objects of the trust are such as to shew that it is divisible. I think, therefore, that as against *James Chambers*, the trustees had power to exercise their discretion as to the postponement of the payment of any part of the fund which remained in their hands at any time up to actual payment.

The truster no doubt has declared that the shares of *James Chambers* should vest on the trustee's death; but "with and under the exceptions and modifications to be afterwards stated." It is judicious, and is common, both in *Scotland* and in *England*, to vest a fund subject to be divested on after events, rather than to keep it unvested and contingent till those events happen. Familiar instances are referred to by Lord *Shand*, as money settled, subject to the life interest of the parents, on the children of a marriage born or to be born, or subject to a power. The interest of each child vests on birth, but is subject to be divested in part by the birth of more children, or in the whole by the exercise of the power.

I do not understand any of the Judges below to say that if there had been no arrestment in this case and *James Chambers* himself had taken proceedings to compel the trustees to pay over the principal to him, the trustees would not have had a good answer. Lord *Deas* seems to admit, or at least does not deny, that the deed of the 10th of January, 1877, would have been good if *tempestivè* executed; but to hold it too late after arrestment. And the Lord President expressly says (2):

> The sole question, therefore, is,—How far is the effect of this clause taken off or modified by what follows? It would be strange if the effect of that modifica-

(1) Law Rep. 1 H. L., Sc. 11. (2) Scotch Cases, 4th Series, vol. v. at p. 127.

tion were that in certain events the shares should not vest at death. That would simply undo what has immediately preceded, and that, in my opinion, is not the effect of the modification. But it is quite possible that a provision may vest and yet in certain events be subject to defeasance. An entailed estate, for instance, may vest fully in an heir of entail, and yet be subject to defeasance. There have been instances of that in cases that have recently come before this Court; and if this is possible in the case of an entailed estate, it may certainly take place in other deeds of settlement made with that purpose. If the clauses that follow are resolutive and not suspensive, vesting takes place as fully and completely as if there had been no conditions appended. What is the effect of the conditions and exceptions that follow. As regards the first part of them, they are neither concerned with vesting nor divesting. They merely deal with the term at which the provisions are to be payable, and if there had been here a postponement of payment by the trustees in virtue of that power, the effect would be, not certainly to make this arrestment bad, but that the right of the arresting creditors to make their arrestment effectual would have been postponed.

Passing over that clause, we come to a clause empowering the trustees to create new trustees or to constitute themselves new trustees, to provide that the beneficiaries are not to be entitled to more than the liferent of the provisions, and that the capital is to be settled on their children "on such conditions and under such restrictions and limitations, and for such uses as my trustees in their discretion may deem most expedient." Now, I quite admit that the effect of the deed which the trustees have executed is to divest the legatee of the right as it then stood vested in him. This deed applies and makes effectual the resolutive condition; it resolves the right in the manner contemplated by the truster; but till it was executed the fee of his share of the residue remained vested in the beneficiaries *just as if no such condition existed.* From that it follows that the fee existed in the legatee, subject to the diligence of his creditors at the date of the arrestments; and on that simple ground I hold that the deed executed by the trustees had no effect on the arrestment previously used by the creditors.

My Lords, I agree with all of this except the seven words which I have emphasized. With deference to the Lord President, he has overlooked the great and fundamental difference between a gift to one, either direct or through the medium of trustees, who are mere conduit pipes to convey the gift to the beneficiary, and a gift subject to a power reserved to trustees to be exercised paramount to the beneficiary and in his despite. I think the arrestment fixes the date at which it is to be determined whether the arresters have a right to attach the fund, and anything that is subsequently done by the debtor, or by those who have rights against the debtor, or by those who claim under him, comes too late after that. But a divesting of the debtor's vested property, by something quite independent of him, is different. If a fund were given to the children born or to be born of *A.*, and the creditors of a person, who at the

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time was the only child of *A.*, arrested the fund, the birth of a second child of *A.* would not come too late to divest one half of the fund. Why? because as I think the fund did *not* remain vested in the only child, just as if no such condition existed, but did remain in him subject to that condition. And I think that the truster, having a perfect right to give his son *James* nothing, had also a perfect right to give him a vested interest in a fund, subject to a condition that the trustees might in their discretion divest that fund; in this I agree with the Lord Ordinary (Lord *Young*) and Lord *Shand*. Whether the truster has by the terms of this deed effectually exercised that right, is a question depending on the construction of the instrument. I think he has.

An ingenious argument which had not been thought of in the Court below was stated at your Lordships' Bar. It was said that the trustees had executed a deed of the 10th of January, without any power of revocation reserved, which they could not afterwards alter; and it was said that, whatever might be their wish, the terms of that deed were such that on its true construction they had irrevocably given *James Chambers* an absolute right to draw and receive the interest during his life, and spend it as he pleased; and consequently the arresters were entitled to do so for their benefit. But I do not think this is the true construction of the deed of the 10th of January. The whole narrative shews an anxious desire to secure that the income, which, it is stated, is not more than is required as a suitable alimentary provision for *James Chambers* and his family, should be so applied. And the final clause that

> So long as the said provision shall be retained as aforesaid, the said *James Chambers* or his children or issue shall only be entitled to draw and receive the interest, or other annual proceeds, of the said balance of his provision during his and their lives,

On which alone the argument rests, is followed by the words,

> And that at such times and in such proportions as we may deem expedient.

There is no rule requiring that any special terms of art such as alimentary should be used, and though the deed might have been more clearly framed, I think the intention to reserve to the trustees a power to control the purposes for which the income was to be spent sufficiently appears; and under the very extensive powers given to them by the truster, the trustees had power to do so as far

as *James Chambers* was concerned. What may be the effect as to his children after his death may be settled then.

My Lords, if this view is adopted by your Lordships, it becomes unnecessary to decide whether the proviso inserted in the testing clause is effectual.

Should it in any future case become material, those who have to decide the question must say whether the very powerful reasoning of Lord *Deas*, agreed to by all the other Judges, is consistent with the *ratio decidendi* of this House in *Dunlop* v. *Greenlees* (1). I wish to say nothing to bias the decision of that either one way or the other.

I entirely agree in the proposed judgment.

LORD GORDON:—

My Lords, the majority of the Judges of the First Division adopted, to a great extent, the argument of the Respondents. Their Lordships held that the declaration inserted in the *testing* clause of the trust deed could not receive effect, and to this part of the case I shall afterwards advert. They also held that the provisions in favour of *James Chambers* had vested in him at the death of the testator, and therefore that these had been validly attached by the Respondents' arrestments before any deed of restriction had been executed by the trustees, and that the Respondents were therefore entitled to be preferred to the funds in the hands of the trustees to the extent of the debt due by *James Chambers*. Lord *Mure* shortly expresses his own opinion, and the result arrived at by the majority of the Court, in these terms (2):

Reading the provisions of this deed, as I think we must, without reference to the tenour of the testing clause, I am of opinion that this fund was arrestable at the date of the Pursuers' arrestments and was validly attached. The broad ground on which I go is that vesting was intended to take place, and did take place at the date of the grantor's death in respect of the express words and declaration of the deed to that effect, while the provision was made payable six months after that event. If, therefore, no such deed as that which the trustees have now executed had been before us, I could have had no difficulty in holding that the arresting creditor must prevail. The only question is, whether the deed executed by the trustees since this case came into Court makes any difference?

(1) June 2, 1865; 3 Macph. 46.
(2) Scotch Cases, 4th Series, vol. v. at p. 118.

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and I am of opinion that it does not, because it appears to me, that as the provision had vested in Mr. *James Chambers* by the express terms of the trust deed at the date of the truster's death in 1870, it required some distinct act on the part of the trustees to divest him of his right to the fund, and until some such step was taken I am of opinion, with Lord *Deas*, that the fund remained attachable by creditors, and was validly arrested by the Pursuers of the present action.

On the other hand, Lord *Shand*, one of the Judges of the First Division, dissented from the views of the majority, and concurred with the Lord Ordinary in the opinion that the trustees of Dr. *Chambers*

Are entitled under the powers conferred by his settlement to retain the money to which the Pursuers, as creditors of Mr. *James Chambers*, maintain they have acquired right, and to apply the interest or proceeds towards the maintenance of Mr. *Chambers* and his family.

And his Lordship stated that, in the view he took of the case, it was *unnecessary* to decide any question as to the effect of the provision in the *testing* clause which declares the annuity, legacies, and provisions left by Dr. *Chambers* to be alimentary, but that on that part of the case he agreed with the opinions which had been expressed by the majority.

I have a very great respect for the opinions of the Lord President and the Judges who composed the majority of the First Division; but I think that in considering the effect of the terms of the trust disposition (*apart* from the terms of the provision in the testing clause, to which I shall afterwards refer), they have failed in this case to give due effect to decisions by your Lordships' House, and also to decisions in the Court of Session. I concur generally in the views taken of the case by Lord *Shand*, with the exception of the view taken by him in regard to the declaration of the alimentary provision in the *testing* clause. But I concur with him in thinking that it is unnecessary for the decision of the case to decide any question as to the effect of the declaration in the testing clause of the deed. I think that the trust deed conferred on the trustees the most ample power of securing the provisions of the children of the testator; and that the rights of the trustees to deal with these provisions could not be affected by the diligence of creditors of the children. I do not doubt that the provisions in favour of the children vested in them, but the provisions vested only *subject to the conditions of the trust*, and specially subject to the power given to the trustees to regulate

the payment of the provisions, or to secure them from the rights of third parties, contained in the deed. I do not think it necessary to comment at any length on the provisions of the deed. These have been fully examined and commented on by Lord *Shand*, and, as I concur generally in his views in regard to them, it is unnecessary to examine them in detail. I shall advert to only two authorities which, I think, confirm the views I take of the case.

In the case of *Duncan, &c.* (*Croom's Trustees*) v. *Adams* (1), a question arose under the terms of a trust deed, whether a legatee whose share of the trust estate, it was alleged, had vested in virtue of express words in the deed to that effect, had power to test on the said share. The testator directed his trustees, at the end of twelve months after his death, or on the eldest survivor of *John Croom Wallace, Esther, Charlotte,* and *Mary Keith,* and the lawful children of *George Croom* attaining the age of twenty-one years complete, whichever of these events should last happen, to realize his estate, and to divide and apportion the whole residue of his means and estate equally among the said *John Croom Wallace,* and *Esther, Charlotte,* and *Mary Keith,* and the children of *George Croom, subject to the conditions* after mentioned, and the survivors and survivor of them, share and share alike, and that *per capita* and not *per stirpes:* And the testator, *inter alia,* directed

The shares or portions before provided to the lawful children procreated and to be procreated of the body of the said *George Croom* at the period of the division aforesaid shall be paid equally to and among the whole children of the said *George Croom,* whether procreated at the said period of division or subsequently procreated, and to the survivors and survivor of them on their respectively attaining the age of twenty-one years, or on the death of their father, whichever of these events shall last happen, with interest on their respective portions till paid;

And the testator provided that

On any of the said residuary legatees, being children of the said *George Croom,* attaining the age of twenty-one years, then the interest or annual produce of his or her portion shall be paid to him or her until the death of their said father, when their shares or portions shall become payable: Declaring that on the eldest of the said residuary legatees attaining the age of twenty-one years, then the whole of the said legacies before mentioned shall vest: Declaring, nevertheless, that, in case any of the children of the said *George Croom* shall die after the said period of division, and before the respective terms of payment, without leaving lawful issue, then the share vested in such deceaser shall be paid to the survivors and

(1) Nov. 30, 1859; 22 D. p. 45.

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survivor of them equally, subject always to the same provisions and declarations applicable to their original shares of my said estate.

John Croom Wallace, the oldest of the annuitants, attained majority in March, 1848.

George Croom died in 1853, leaving five daughters and two sons. One of them, *Mary Croom*, died in April, 1858, before attaining majority. She left a settlement, by which she appointed her sister, Mrs. *Adams*, and Dr. *William David Adams* her executors, and disposed of her estate.

Mary Croom's executors asked from *John Croom's* trustees payment of her share of that portion of his estate bequeathed to the children of her father, *George Croom*, and raised an action of multiplepoinding in the name of the trustees under *John Croom's* settlement, in which the fund *in medio* condescended on was *Mary Croom's* share of *John Croom's* succession, amounting to £1205 under deduction of residue duty.

The executors claimed (1), to be ranked and preferred to the whole fund *in medio;* or (2), if it should be held that the share of the estate of *John Croom* falling to *Mary* and forming the fund *in medio* had not vested in her, and was not within her power of disposal by will, the claimant, Mrs. *Adams*, as *Mary Croom's* sister, claimed to be ranked *pari passu* with the other brothers and sisters of *Mary*, five in number.

Lord *Benholme* (Lord Ordinary) pronounced an interlocutor (1), ranking and preferring Dr. and Mrs. *Adams* in terms of the second alternative of their claim, holding that

> As the testator has in the event which has happened, ordered payment to be made to the survivors of *George Croom's* family without any qualification, and as he has given this instruction in the very face of the declaration as to the vesting, and as it were as a rider upon it, the Lord Ordinary thinks it safest to give effect to that instruction.

A reclaiming note was presented for Dr. and Mrs. *Adams*, who maintained that the trust deed provided that the bequests to the legatees should vest on a certain event, viz., when the eldest legatee attained majority, and that that was the period of division, and they were clearly intended then to vest, as the legatees were to receive interest from that period; and that there was nothing in the deed to take off the effect of the precise declaration as to

(1) Nov. 30, 1859; 22 D. at p. 48.

the date of vesting; and that though the truster provided a substitution in the event of a legatee dying intestate, that substitution was evacuated by Miss *Croom's* settlement, she having survived the period of vesting.

The Lord Justice Clerk (the present Lord President *Inglis*, then President of the Second Division) said (1):

The provisions in this settlement are peculiar. I have often thought, and may have remarked, that it would be desirable, in order to avoid the difficulties which arise in the construction of settlements as to the period of vesting, that testators should *expressly declare* when the vesting is to take place. Here, however, the testator has done so expressly, and thence has arisen the whole difficulty in the case; so I fear that is a very doubtful remedy. We must read this deed as the Lord Ordinary has proposed to read it, not with a view only to the technical interpretation of the words used, *but in order to arrive at the true meaning of the testator*. There may be clauses creating not only embarrassment but even inconsistency. *But when a trust is created, the Court is entitled to read the directions to the trustees for the mere purpose of ascertaining the intention of the truster, apart from the technical meaning of particular terms in the deed.*

And after considering the terms of the deed, his Lordship expressed his opinion that though there was an express declaration that the shares were to vest on the occurrence of a certain event, yet that that declaration must be read in connection with and be controlled by the other provisions in the deed. Lord *Wood* concurred with the Lord Justice Clerk, and said:

Although there may at first sight seem to be an inconsistency here there is no real inconsistency. If the deed be considered *as a whole*, it is clear that there is no inconsistency in the mind of the testator; he did not mean one thing in one part of it, and another thing is another part. He declares indeed that the shares shall vest at the period of division, but then he goes on quite consistently to qualify that declaration by the explanation immediately following. *He may appoint a sort of vesting, but it is subject to and restricted by the rights conferred on the survivors at the date of payment.*

And Lord *Benholme* (who had been Lord Ordinary in the case, and was then one of the Judges in the Second Division), said:

I adhere to the view which I have had all along, that *the intention of the truster in his declaration, qualifying the provision of vesting, is so very clear, that I could not allow any argument founded on the mere technical meaning of the words used to override what stood out on the face of the deed as the intention of the truster.*

I think that decision is entitled to much weight, and that the principle there laid down is what ought to rule the decision in the present case. It was there held that though the direction as to

(1) Nov. 30, 1859; 22 D. at p. 49.

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the period of vesting of the provisions was most precise, just as is contended by the Respondents in this case, yet that that direction was controlled by the other provisions of the deed, and that the deed must be read, as the Lord Justice Clerk (*Inglis*) said, "not with a view only to the technical interpretation of the words used, but in order to arrive at the true meaning of the testator."

Applying that principle to the present case, I can entertain no doubt whatever that the intention of the testator was that his trustees should have, and should exercise if they thought proper, the very important power of control over the provisions made in favour of his children. The clause conferring the powers is very carefully framed, and the subsequent clause directing the trustees to assume new trustees "in order to prevent the failure of the *discretionary* powers hereby conferred," shews how anxious the testator was on the subject. I have no doubt that in this case the clauses declaring the period of vesting, and fixing the period of payment of the provisions are overruled and controlled by the subsequent clauses; and that the trustees had power, and were entitled when they thought proper to exercise that power and limit the rights of *James Chambers* as they have done.

The next case to which I shall refer is one relating to the *power* and *duty* of trustees under a clause permitting a restriction of provisions such as occurs in the present deed. The case to which I refer is that of *Ker's Trustees* v. *Weller* (1). In that case the trustees were directed by the trust deed to limit the right of the truster's son, in the event of his not conducting himself so as to merit the approval of the trustees, to a life-rent of an heritable estate, which was to be made over on his attaining the age of twenty-five. The son married when he was twenty-two, and on that occasion the trustees entered in their minutes an approval of the marriage; and the marriage settlements proceeded on the footing of the son having right to dispose of the fee of the property. It was held by the Lord Ordinary (Lord *Kinloch*) that the power conferred on the trustees might be exercised at any time before the son attained twenty-five years, and might be exercised by a majority of the trustees in office at the time, although another trustee who had been in office during a portion of the time when

(1) Dec. 19, 1863, Scotch Cases, 3rd Series, vol. ii. p. 371; Law Rep. 1 H. L., Sc. p. 11; 4 Macph. (H. L.) 8.

the conduct disapproved of had taken place, had died. The case came before the First Division, then presided over by Lord President *McNeill*, afterwards Lord *Colonsay*. The Lord President and Lord *Curriehill* affirmed the Lord Ordinary's interlocutor, but Lord *Deas* dissented, proceeding chiefly upon the ground that the trustees, by approving of the marriage and the marriage settlements, were precluded from exercising the power in question to the prejudice of the wife and children of that marriage.

This judgment was taken to appeal (*Weller* v. *Ker and Others* (1)), the 1st of March, 1866. The marginal note bears that

When a power coupled with a duty is conferred upon trustees, to be executed by them at a fixed period, and after they have come to a judgment as to the conduct of the individual to be affected, they cannot divest themselves of the power, or execute it until the time appointed, nor can they enter into any anterior contract respecting it. It was held to be the duty of the trustees (the husband having in their judgment subsequently misconducted himself) to execute the power so as to restrict him to a life interest, although the effect was to defeat the provision for the wife, as well as other claims founded on a confident expectation that the marriage settlement would not be disturbed.

The Lord Chancellor (Lord *Cairns*) said:

It seems a very strange proposition that if a testator gives power to trustees evidently to be exercised only with reference to the interests of his children or those for whom he is providing, the trustees shall be able to say, "We give up that power," a power which was committed to them, not for their own benefit, but for the benefit of others. But whether they had the power of divesting themselves or not, my clear opinion is that they never did divest themselves of that power.

Lord *Chelmsford* said that he entirely agreed in the opinion of the Lord Ordinary and of the majority of the Judges of the Court below. His Lordship added:

It appears to me that the trustees could not either abandon or fetter the exercise of the power intrusted to them. It was a power coupled with a duty of a most important character. It was evidently intended that it should be retained and freely exercised down to the time when they were called upon to convey the estate. But even assuming that the trustees might have bound themselves not to interfere with the rights and interests created by the marriage settlement by giving their consent to it, in point of fact so such consent was ever given. That they consented to the marriage is clearly proved, and this would of course prevent their afterwards making it the ground of objection to the conveyance of the fee to the heir. But it is not correct to say that the consent to the marriage carried with it a consent to the marriage settlement. The trustees' names were designedly omitted as consenting parties to the settlement. But if they had consented to the settlement it would, in my judgment, have made no difference. All parties

(1) Law Rep. 1 H. L., Sc. pp. 11, 14, 15.

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knew, or ought to have known, that the provisions of the settlement could only be contingent and conditional, depending upon the conduct of the son till his age of twenty-five.

Lord *Kingsdown* said, "I entirely agree with my noble and learned friends."

That decision, I think, rules the point which your Lordships have to decide as to the effect of the arrestments used by the Respondents in the hands of Dr. *Chambers'* trustees. The power given by the testator was (in the words of the Lord Chancellor) "evidently to be exercised only with reference to the interests of his children," and that being so, I am of opinion with his Lordship in that case, that the trustees here would not be entitled to say, "We give up that power," a power which was committed to them, not for their own benefit, but for the benefit of others. The power was to be exercised by the trustees "if they see cause and deem it fit." Apparently they saw no cause for interfering with *James Chambers'* provision until his proceedings were brought under their notice by the arrestments used in their hands; but his conduct and the state of his affairs having been brought under their notice, the trustees saw cause and deemed it fit to intervene. They, in the first place, intimated in their defences to the summons of forthcoming that they had thought it proper and had resolved to postpone the payment of the balance in their hands and to pay the interest only to *James Chambers* for his aliment as provided for in the deed. And then the trustees executed the deed of January, 1877, by which they retained vested in themselves the whole of the balance of the provisions or share of the residue falling to *James Chambers* in trust for his behoof during his lifetime, and after his death for behoof of his children. I am of opinion that the deed so executed by the trustees is a valid deed, that they were entitled to exercise the power vested in them at any time before payment, and that they were not interpelled from the exercise of their powers by the arrestments used in their hands.

A question has been raised as to the power of the trustees, there being no power of revocation in the first deed, to execute the second deed of July, 1877, which declares that the provisions were vested in the trustees in trust only "for behoof of the said *James Chambers* in life-rent for his life-rent alimentary use "alle-

narly," and after his death for behoof of his children. I am of opinion that the question so raised does not require to be decided, for I think the effect of the first deed is effectually to secure the whole provision against the diligence of the creditors of *James Chambers*, for the deed declares that

> So long as the said provisions shall be retained as aforesaid, the said *James Chambers*, or his children, shall only be entitled to draw and receive the interest or other annual proceeds of the said balance of his provisions during his and their lives, and that at such times and in such proportions as we may deem expedient.

I think the views which I have expressed are sufficient for the decision of the case, and that it is not necessary to consider the question raised as to the validity of the declaration inserted in the testing clause of the deed declaring the provisions to be alimentary (1), and, therefore, I would prefer that your Lordships should leave the point to be disposed of in some case where it is really necessary to be decided, and where the authorities are more fully discussed than I think they were in the Court of Session, or before your Lordships. But as the Court below has dealt with that question, and it has been discussed at your Lordships' bar, it is right that I should state my views in regard to it.

The Lord Ordinary (Lord *Young*) was of opinion that the declaration inserted in the testing clause must be read and receive effect as part of the testamentary deed of the testator; but their Lordships of the First Division were unanimous in holding that, as the proper function of the testing clause was to state the particulars required by the testing statutes, in regard to the subscription of the grantor and authentication of the deed by the subscribing witnesses, the insertion of a substantive provision going beyond this was ineffectual, and consequently that the declaration in question could not be regarded as part of the deed.

There can be no doubt that the testing clause is not a proper place for the insertion of an important clause, or for any clause, unconnected with the testing of the deed. But I think the decisions to be afterwards referred to shew that words of much importance to the validity and effect of a deed may be so inserted. The late Professor *Montgomerie Bell*, Professor of Conveyancing in the University of *Edinburgh*, in his Lectures on Conveyancing, says (p. 224):

(1) *See ante*, p. 797.

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As a general rule, all matter foreign to the proper purpose of the clause ought carefully to be excluded. Sometimes, however, it is unavoidable to introduce in the testing clause an addition to the deed not appropriate to that clause; and *if the addition be made in competent form, and duly authenticated, effect is not denied to it as part of the deed.*

I think this passage shews that it was not considered by practitioners to be *incompetent* to insert in the testing clause "an addition to the deed not appropriate to that clause." If it was averred that the addition so inserted was done without authority, or that it was not duly authenticated, there might be room for inquiry. But there is no such allegation made in the present case. The declaration in question is part of a probative deed, and the deed is founded upon by both parties.

There are decisions, not only of the Court of Session, but of your Lordships' House, which appear to sanction the validity of a declaration inserted in a testing clause. I may refer to the cases of *Johnstone* v. *Coldstream* (1) and *Dunlop* v. *Greenlees* (2). With reference to the case of *Johnstone* v. *Coldstream*, Lord *Deas* says (3), in his opinion in the case now before your Lordships, that in the case of *Dunlop* v. *Greenlees:*

> I am correctly reported to have said, "The first point" (whether the wife's signature bound her as a party to the first deed) "was decided in the case of *Johnstone;* and I concur with your Lordship that we cannot go back upon that case, which, moreover, I think was rightly decided.

And then he goes on to say:

> I do not think I require to impugn either my own opinion or that of the House of Lords in *Dunlop* v. *Greenlees* in order to come to the conclusion that the "express provision and declaration" introduced into the testing clause of the present deed is beyond the proper functions of a testing clause.

The case of *Dunlop* v. *Greenlees* was decided in your Lordships' House on the 2nd of June, 1865. The Lord Chancellor (*Westbury*) said (4):

> The first point which presents itself is one entirely affecting the practice of *Scotland* as to the execution and attestation of settlements, and it is a point unquestionably of the utmost possible importance. The point has arisen and been decided in *Scotland* before, and your Lordships are asked by the Appellant to reverse that decision pronounced by four of the most eminent Judges in *Scotland*, and acted upon for the last twenty-three years. The point arises in this way: *Matthew*

(1) June 30, 1843; 5 D. 1297.
(2) Nov. 2, 1863; 2 Macph. 1; aff. June 2, 1865; 3 Macph. (H. L.) 46.
(3) Scotch Cases, 4th Series, vol. v. at p. 114.
(4) 3 Macph. (H. L.) at p. 49.

Greenlees, by deed dated the 18th of February, 1835, declared that a provision for his wife of an annuity of £40 should be accepted by her in satisfaction of all terce (1) of lands, half or third of moveables, and every other claim competent to her, by and through his decease in any manner of way. The testing clause is conceived in these words: After the formal introductory words and the mention of the fact of subscription by *Matthew Greenlees*, "and by me the said *Janet Brackenridge* or *Greenlees* in token of my consent to and approval of the foregoing settlement," and at the foot her signature is appended. It was contended that these words introduced matter foreign to the purpose of a testing clause. It was said that the clause should be confined to the statement of the formalities of execution, and of the fact of execution. The same objection was urged before the Court of Session in a case determined in June, 1843, and in that case the Lord Ordinary (*Ivory*) entertained it for the first time. That case, my Lords, is hardly distinguishable from the one now before your Lordships. The Lord Ordinary stated that he was not aware of any instance in which the testing clause was made use of for such a purpose. His interlocutor was carried to the Inner House and made the subject of deliberate consideration. The Lord Justice Clerk delivered a very long and elaborate judgment, in which Lord *Medwyn* and Lord *Meadowbank* concurred, and Lord *Moncreiff* considered the objection of the Lord Ordinary a mere attempt to introduce a doubt where no doubt had previously existed. The whole objection is rested on a radical error. The testing clause is by the law of *Scotland* a part of the deed, and if that is so, then it is as much in the body of the deed as any other part of it. The Statutes of 1574 and 1681 are quite in accordance with that view. If that is so, my Lords, the whole objection falls. There can be nothing more dangerous than in a question concerning the proper form of a testing clause that your Lordships should now reverse the solemn decision arrived at by the Courts of *Scotland*. Infinite mischief would arise were that decision to be reversed. I think, therefore, that your Lordships will not for one moment entertain the idea of departing from it. It is a satisfaction to be able to say that, had I been called upon to determine this question for the first time, I would have arrived at the same conclusion as that in the present case.

Lord *Cranworth* expressed an opinion to the same effect. And with reference to the argument that the case of *Johnstone* was a case of the same kind, as indicating the express confirmation of the wife, he says:

That provision was, however, not superfluous, because the validity of the consent depended on the provision being remuneratory. That shadow of an argument, therefore, entirely fails.

Lord *Chelmsford* also concurred, saying (2):

I entirely concur in the opinion of your Lordships. I may add that, from the moment the case was opened, I could not bring my mind to entertain the slightest doubt on the question. I concur in the regret expressed by my noble and learned

(1) The terce, *tertia*, is a life-rent, competent by law to widows who have not accepted of a special provision, of the third of heritable subjects in which their husbands died infeft: Erskine, 2, 9, 44.

(2) 3 Macph. at p. 50.

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friend (the Lord Chancellor), that the Appellant did not submit to the four decisions against her in *Scotland*, but has proceeded to impose large expenses on the Respondent in defending this appeal. The matter is hardly worthy any observation. There appear to be three points. The first is, whether Mrs. *Greenlees* is bound by her signature to the deed of 1831. That she was so bound, is clear from the decision in *Johnstone* v. *Coldstream* (1); and though Lord *Ivory* said the testing clause must be confined to the immediate objects of attestation, yet, after careful consideration, the Judges came to a different conclusion, and decided that a consent expressed in a testing clause was sufficiently binding. There is no doubt as to the propriety of that decision. In *Leighton* v. *Russell* (2) and in the present case not one of the Judges expressed a doubt of its correctness. The present decision has been sanctioned by the Sheriff Substitute, the Sheriff, and the unanimous decision of the Court of Session; and under these circumstances it would be a very dangerous thing to evince a disposition to throw a doubt upon it, and thereby affect the validity of many deeds executed on its faith.

I think it would not be right that your Lordships should disregard a case which received the sanction of these noble and learned Lords so late as 1865, and which had previously received the sanction of some of the most able Judges of the Court of Session, and which must have regulated rights of property for about a quarter of a century before the date of your Lordships' judgment. If it had been necessary for the decision of this case, I would have been prepared, as at present advised, to hold that the declaration introduced into the testing clause was entitled to receive effect as part of the settlement of the testator. But, for the reasons already given, I do not consider that it is necessary for the decision of the case to determine whether effect can be given to the declaration in the testing clause.

On the whole matter, therefore, I am of opinion that the judgment pronounced by the First Division of the Court of Session should be reversed, with costs.

Judgment of the House:—Ordered and Adjudged, that the said interlocutor of the Lords of Session in *Scotland*, of the First Division, of the 9th (signed 10th) of November, 1877, complained of in the said appeal be, and the same is hereby reversed; and that the Defenders (Appellants) be assoilzied from the conclusions of the action with expenses; that the said Respondents do pay to the Appellants the costs incurred by them in respect of the appeal.

Lords' Journals, April 15, 1878.

Agents for Appellants: *Simson, Wakeford, & Simson.*
Agent for Respondents: *Charles Butcher.*

(1) June 30, 1843; 5 D. 1297. (2) Dec. 1, 1852; 15 D. 126.

[PRIVY COUNCIL.]

GEORGE URQUHART . . . . . PLAINTIFF; J. C.*

AND 1878

DUNCAN MACPHERSON . . . . . DEFENDANT. *May* 21, 22.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Contracts obtained by Fraud voidable but not void.[1]

In an action by the Appellant against the Respondent for alleged breaches of certain covenants contained in their deed of partnership, and for fraud alleged to have been committed by the Defendant in obtaining a deed of dissolution thereof; it appeared that as regards the said breaches the Plaintiff had, by the deed of dissolution, in consideration of the Defendant having given up the whole of the partnership assets to the Plaintiff, released the Defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the said deed of dissolution contained :—

Held, that as the release could not be separated from the rest of the deed of dissolution, and as the Plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him.

Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party if the contract be disaffirmed, can be remitted to his former state.

Clarke v. *Dickson* (E. B. & E. 148) approved.

APPEAL from a judgment of the Supreme Court (April 17, 1877), by which it was ordered that the verdict entered for the Appellant in an action brought by him against the Respondent in the said Court should be set aside, and instead thereof a verdict entered for the Respondent upon the issues as to the 1st, 3rd, and 5th counts of the declaration, and upon the 3rd issue as to the 2nd and 4th counts respectively.

The action was tried twice, the jury on the first occasion being unable to agree.

The declaration, as it stood at the close of the second trial

* *Present* :—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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(having been amended in the course of that trial), contained six counts. The first four counts alleged that before and at the time of the committing of the breaches therein respectively mentioned, the Appellant and the Respondent were partners in a certain business, which partnership had, at the commencement of the action, been finally dissolved, and that the Respondent, by deed dated the 28th January, 1859, covenanted with the Appellant that he would contribute to the capital of the business a sum of £10,000. In the 1st count the Appellant alleged as a breach that the Defendant had not contributed that sum to the capital of the business. In the 2nd, 3rd, and 4th counts the Appellant alleged further breaches of covenants in the deed to keep and make certain entries in certain stock-books and books of account, not to withdraw his share of the capital of the partnership, and to pay into the *Oriental Bank* at *Melbourne* all moneys, bills, notes, and securities which should come to the hands of the Respondent in respect of the partnership, and that no moneys should be drawn or paid on account of the partnership otherwise than by a cheque signed by the Respondent in the name of the partnership. In the 5th count the Appellant sued the Respondent for alleged breach of a covenant in a deed of dissolution and release, dated the 11th of January, 1860, by which the Respondent covenanted with the Appellant that he, the Respondent, had not at any time theretofore assigned, released, discharged, or received any of the credits of the partnership, except such as were entered as received in the books of the partnership. And in the 6th count, which was added after the close of the Plaintiff's case on the second trial, the Appellant alleged that the Respondent had induced him to take upon himself all the liabilities of the business, and to discharge and release the Respondent therefrom, and from all claims in respect thereof, by certain alleged fraudulent representations therein set out.

To the above declaration the Respondent pleaded, (1), as to the first four counts, *non est factum*, (2), a denial of breaches, and (3), a release by deed before action; (4) to the 5th count, *non est factum*, and (5) a denial of the breach therein assigned; and (9) to the 6th count the general issue, and (10) that the alleged cause of action in the said count mentioned did not accrue within six years before the said action.

The Appellant took issue on the above pleas, and replied (2) to the 3rd plea, that the release pleaded by the Respondent to the first four counts of the declaration was procured by the fraud of the Respondent, and (3) on equitable grounds to the 9th and 10th pleas, which were pleaded to the 6th count, that he commenced the said action within six years next after notice to him that the representation in the 6th count mentioned was a fraudulent representation.

The Respondent took issue on the Appellant's 2nd and 3rd replications, and also demurred to the said 3rd replication as bad in substance.

The said deeds, and the facts of the case, are sufficiently set forth in the judgment of their Lordships.

Mr. *Herschell*, Q.C., and Mr. *E. L. Nugent*, for the Appellant.

Mr. *Benjamin*, Q.C., and Mr. *R. E. Webster*, Q.C., for the Respondent.

The judgment of their Lordships was delivered by

SIR MONTAGUE E. SMITH:—

The Appellant and Respondent in this case were partners as sheep farmers and graziers upon certain stations, one of them called *Glen Urquhart*, in the colony of *Victoria*. The action was brought by the Appellant against the Respondent for alleged breaches of certain covenants contained in the deed of partnership, and also for an alleged breach of one covenant contained in the deed of dissolution of partnership. There is also a count founded upon an allegation of fraud committed by the Defendant in obtaining the deed of dissolution.

The general facts are these: the Plaintiff, who had carried on the business of a sheep farmer at *Glen Urquhart* for some years, being desirous of going to *England*, negotiated a partnership with the Defendant. It was part of the terms of the original treaty that the capital should be £20,000, each partner bringing in £10,000 in cash; and instructions were given for the deed of partnership upon that footing. Whilst the deed was in preparation, the parties came by a parol agreement to a totally different

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arrangement regarding the capital. It appeared that the Defendant had sheep to the value of about £18,000, with which he was ready to stock the stations, and the Plaintiff had upon the runs sheep of the value of about £8000; and in order that the Plaintiff might balance the value of the sheep brought upon the station by the Defendant, he agreed to advance the sum of £10,000 in cash; each, therefore, in that way contributing £18,000, making a total capital of £36,000. But the parties did not think it worth while to have any alteration made in the deed, which still stands as a deed by which the parties were to contribute £20,000 in equal proportions in cash.

What happened with regard to the capital so arranged was this: Messrs. *Power & Rutherford* had been the agents for *Glen Urquhart* and the other stations held by the Plaintiff for some years, and it was arranged that they should continue to be the agents. As far as the evidence, which is extremely scanty and obscure, furnishes information, it would seem that the financial business of the stations was managed during the partnership by Messrs. *Power & Rutherford.* They acted as the factors and financial agents of the partnership; the moneys derived from sales passed through their hands; and, indeed, from the entries in their accounts it would seem that they conducted the sales, or that the sales were in some way made through them. It appears, also, that both the Plaintiff and the Defendant had private accounts with Messrs. *Power & Rutherford. Power & Rutherford* had advanced to the Defendant the money to purchase the sheep which he was going to bring upon the stations. Those sheep were apparently valued at £17,365. A balance was owing on the Defendant's private account to them (caused, no doubt, by the advance made by them for the purchase of the sheep), of £13,686,—being £3000 and upwards less than the value of the sheep. Messrs. *Power & Rutherford,* in their account with the partnership, debited the partnership with the full value of the sheep, £17,365, treating that as the capital brought in by the Defendant, and debiting the partnership with it. At the same time they gave credit to the Defendant in his private account for the same amount. Much the same course was taken with respect to the Plaintiff. *Power & Rutherford,* in their account with the partnership,

debited the partnership with £8226, the value (apparently) of the Plaintiff's sheep, and as they had credited the Defendant's private account with the value of his sheep, they credited the Plaintiff's with the value of his, namely, the £8226. Then there was the £10,000 which the Plaintiff had agreed to supply in cash. As far as the obscure state of the evidence allows an opinion to be formed, it would appear that this sum was not really advanced by the Plaintiff, but was raised upon a cash credit bond given to the *Oriental Bank*, under which bills were drawn by *Macpherson* upon *Urquhart*, which were discounted by that bank, and the proceeds placed by *Power & Rutherford* to the credit of the partnership. When the bills became due they do not appear to have been taken up by the Plaintiff, but to have been retired by *Power & Rutherford*, and *Power & Rutherford* having retired them, appear to have placed what they had so paid to the debit of the partnership. Therefore the partnership was debited with the capital of both partners, neither having brought in any cash, but one having brought in sheep to the value of (say) £18,000; the other, sheep to the value of (say) £8000, and lent his credit for the £10,000, upon which credit the money was raised. On looking at the bond which was given to the *Oriental Bank*, it appears that *Macpherson* was treated in it as the principal, and *Urquhart* as the surety, although *Urquhart* had agreed to supply the £10,000 as part of his share of the capital of the partnership.

It is to be observed that the action was not brought until more than fifteen years after the dissolution had taken place. The first four counts of the declaration are founded upon four covenants in the deed of partnership. The first count is for the Respondent's breach of the covenant to contribute the sum of £10,000 as capital; the second is for the breach of the covenant to keep proper books of account; the third is for the breach of the covenant by the Defendant not to withdraw his share of the capital from the partnership; and the fourth for a breach of the covenant to pay all moneys received on account of the partnership into the *Oriental Bank*. The jury at the trial found that the breaches alleged in these four counts were proved.

Upon the case coming before the Court on a rule to enter a nonsuit, or for a new trial, the Court having power to draw in-

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ferences (which power must however be taken to be subject to the findings of the jury, and limited to this, that the Court might enter a nonsuit or change the verdict if there was no evidence upon which the jury could reasonably act,) the Judges agreed with the jury that the breaches alleged in the second and fourth counts were proved; but thought there was no evidence to sustain the breaches in the first and third counts. They were of opinion that it was not shewn that the Defendant had not contributed his share of the capital, nor was it shewn that he had withdrawn any of it. In deciding upon those breaches, the Court referred to the state of facts which has been already described. Their Lordships do not think it necessary to enter at present upon a consideration of those facts. It will be sufficient to say that they agree generally with the findings of the Court; a decision on the breaches having become immaterial, because upon the plea of release to the four first counts of the declaration their Lordships think the Defendant is entitled to succeed.

The plea of release alleges that by the deed of dissolution of this partnership the Plaintiff released the Defendant from all the claims mentioned in the first four counts. There is no doubt that the deed contains such a release. To that plea there is a replication that the release was obtained by fraud. The Court held on demurrer that this replication was no answer to the plea, inasmuch as the Plaintiff has not disaffirmed the contract of which the release forms a part, and in fact was not in a condition to disaffirm or rescind it, being unable to place the Defendant in his original position.

With reference to the main argument by which it was sought by Mr. *Herschell* to impeach the decision of the Court, namely, that this release is severable from the rest of the deed, it will be necessary to refer shortly to the deed of dissolution. It recites the deed of partnership which was dated the 28th of January, 1859, from which it appears that there were some stations or tracts of land brought into the partnership by the Defendant in addition to the stations which the Plaintiff possessed. The general scheme of this deed of dissolution is, that the Plaintiff was to take over the whole of the assets of the partnership, the stations, the stock, and all the credits, and was to pay all the debts and

liabilities of it. It appears too by this deed that the tracts of land which had belonged to the Defendant were assigned by him absolutely to the Plaintiff, with the exception of the *Chintin* station, which was to be retained by him. The deed also contains covenants on the part of the Defendant, one of which covenants is the foundation of the fifth count of the declaration, to be presently adverted to, by which the Plaintiff secured himself against certain contingencies and liabilities.

Such being the general nature of the deed, the release which it contains is found at the end of it, and is in these terms: "And this indenture lastly witnesseth, that in consideration of the premises, each of them the said *George Urquhart* and *Duncan Macpherson*, for himself, his heirs, executors, and administrators, doth hereby remise and release, and for ever quit claim unto the other of them, his executors, administrators, and assigns, all actions, suits, accounts, reckonings, claims, and demands whatsoever at law or in equity, which either of them the said parties, his heirs, executors, or administrators, now hath or hereafter may have, claim or demand against the other of them, his heirs, executors, administrators, or assigns, for or by reason of any matter or thing whatsoever touching or concerning the said joint trade or partnership, subject and without prejudice nevertheless to the covenants and agreements herein contained." Therefore the object of this release, as far as the Defendant was concerned, was to release him from all matters and things whatever touching or concerning the joint trade, without prejudice to the covenants which he had entered into for the security of the Plaintiff with regard to certain matters.

It seems to their Lordships impossible to sever this release from the rest of the deed. There is but one contract for the dissolution of partnership, though containing many terms, of which this release is one. It is expressly said to be made "in consideration of the premises," that is, in consideration of the Defendant having given up the whole of the partnership assets to the Plaintiff, and his own runs, which at the end of the partnership would otherwise have reverted to him.

Then, if the release cannot be separated from the rest of the contract it falls within the ordinary principle. Contracts which may

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be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state. The Plaintiff has taken the whole benefit of the deed so far as it was beneficial to him, without at any time attempting to repudiate it, and it now being impossible to restore the Defendant to his original position, he seeks to destroy one particular part of the contract, and that their Lordships think he cannot do.

If authority were wanted in support of a principle so common as that to which their Lordships have adverted, it may be found in the case which is referred to in the judgment of the Court below: *Clarke* v. *Dickson* (1). In that case Mr. Justice *Crompton* says,—"When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party defrauded, it seems to me to follow that when that party exercises his option to rescind the contract he must be in a state to rescind, that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

The Plaintiff was not without remedy. He was entitled to an action founded upon the fraud in which he would recover the true amount of damages which he had sustained. Indeed the sixth count of his declaration is founded upon such a cause of action. To that count however, there is a plea of the *Statute of Limitations*, namely, that the action did not accrue within six years. The Plaintiff replied to that plea, that he did not know of the fraud until within six years of the commencement of the action. The Court has held that this replication is no answer to the plea, and the learned counsel at the Bar have not attempted to dispute the correctness of that judgment. The replication, which is an equitable one, was held by the Court to want the allegations necessary to constitute a good equitable answer to the plea.

The only remaining count is the fifth, which is founded upon a covenant contained in the deed of dissolution. The principal argument of the Appellant has been directed to the support of this count. Before adverting to the transactions which it is contended are a breach of this covenant it will be well to refer to the words

(1) E. B. & E. 148.

of it as laid in the declaration. The fifth count states that the Defendant covenanted that he "had not at any time theretofore assigned, released, discharged, or received any of the credits of the said partnership except such as were entered as received in the books of the said partnership, or had done any other act whereby the credits and effects by the said last-mentioned deed assigned to the said *George Urquhart*, or intended so to be, or any part thereof, had or had been, or should or might be charged or incumbered in any manner howsoever, yet the Defendant hath broken his said covenant in this, to wit, that he had before the date of the said deed assigned, released, discharged, and received divers credits of the said partnership other than those which were entered as received in the books of the said partnership, whereby the assets of the said partnership became and were greatly reduced in value to the Plaintiff, and the Plaintiff believing that all the credits of the said partnership which had been assigned, released, discharged, or received had been entered in the said books, and there was a large amount of outstanding credits due to the said partnership, released the Defendant therefrom and took upon himself all the liabilities of the said partnership." The Plaintiff says he was led to suppose that there were outstanding credits. In this statement of damage he puts his own construction upon the meaning of the covenant.

The Defendant asked for and obtained particulars of the breaches of the covenant. There are three transactions given in those particulars as breaches. The first and main one is with respect to the £17,365 which *Power & Rutherford* had debited to the partnership account. The particulars state the breach in this way: "A credit of the partnership mentioned in the declaration, amounting to the sum of £17,365 17*s.* 9*d.*, received by the Defendant in manner hereinafter set forth, and not entered as received in the books of the said partnership." Then, "the said amount was, as on the first day of January, 1859, placed to the credit of the said Defendant by *Power & Rutherford*, and by them charged against the said partnership in manner following"—stating the amounts transferred from *Macpherson's* account. "By the means aforesaid the said Defendant received the sum of £3699 6*s.* 11*d.*, and was released and discharged of and received a debt then owing by

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him to the said *Power & Rutherford,* amounting to the sum of £13,666 10*s.* 10*d.*, and the said partnership or the Plaintiff subsequently paid the said *Power & Rutherford* the said sum of £17,365 17*s.* 9*d.*" This transaction was stated at the outset of the present observations; and if it were correctly stated (and as far as the obscurity of the evidence allows the statement appears to be correct) the transaction with one partner balanced that with the other: the capital of each being dealt with in the accounts of *Power & Rutherford* in the same manner.

Then, has there been a technical breach of this covenant? Their Lordships do not think there has been. The debit to the partnership of the £17,365 cannot be said to be the receipt of a credit of the firm by the Defendant within the meaning of this covenant. It may be that that sum was debited to the firm without sufficient authority on the part of the Plaintiff, and that he was entitled to challenge it; but it does not seem to be in any sense a credit of the firm received by the Defendant which he should have entered in the partnership books. To bring this case within this covenant the Plaintiff must first establish that it was a credit; then that it was received by the Defendant, and lastly that it ought to have been entered in the books. It is true he got credit for a similar sum in his private account, but that credit which *Power & Rutherford* gave him in his private account does not seem to be one which required to be entered in the partnership books. Their Lordships think the transaction in its nature and in effect is not one of those that fall within the limited scope of the covenant upon which the breach is alleged.

It may be observed that the Court below do not advert to this transaction in their decision upon this breach; and apparently, if argued at all, it must have been given up before the Judges delivered their judgment. If, as at their Lordships' Bar, it had been relied upon as the main ground upon which the breach in question could be supported, it is inconceivable that the Court should not have noticed it in the judgment they delivered upon that breach.

The judgment of the Court is confined to the second transaction contained in the particulars, which is thus stated in the particulars: "Credits of the partnership mentioned in the declara-

tion received by the Defendant from the several persons hereinafter mentioned (whom he released from payment thereof), and assigned by him to the said *Power & Rutherford*, without having been entered as received in the books of the said partnership." Their Lordships think that this is a wholly incorrect description of what occurred. It appears that *Power & Rutherford* were the salesmen, or employed salesmen, to sell for the firm; that they had sold wool and skins to *Goldsborough* and had received the proceeds. They received the proceeds, and it is incorrect to say that the Defendant received them and assigned them to *Power & Rutherford*. The latter received the money as the factors for the firm, and apparently in the ordinary course of business. It is impossible therefore within the terms of the covenant to convert this and other similar transactions into a receipt of credits by the Defendant assigned by him to *Power & Rutherford*, and their Lordships entirely agree with the view taken by the Court below upon this point.

The remaining transaction is thus stated in the particulars: "A credit of the partnership assigned by Defendant (without having been entered in the books of the said partnership) to *Power & Rutherford*, by granting them his promissory notes or acceptances as under," and then certain promissory notes and acceptances amounting to £10,770 are set out. Their Lordships think that these notes and acceptances were not existing credits due to the partnership transferred to *Power & Rutherford*. It appears by the terms of the deed that the Defendant had authority to draw bills and give acceptances for the purposes of the firm, and that those in question were given to *Power & Rutherford* in order to put them in funds for carrying on the business of the firm. It is incorrect therefore to describe these transactions as assignments by the Defendant of credits of the firm.

On the whole, therefore, their Lordships are of opinion that the Court below was right in the judgment which it has given, and they will humbly advise Her Majesty to affirm that judgment with costs.

Solicitor for the Appellant: *T. H. Strangways.*
Solicitor for the Respondent: *F. Stanley.*

[PRIVY COUNCIL.]

J. C.* 1878 *April* 2, 3; *May* 28.

FREDERICK LEVI . . . . . PLAINTIFF;

AND

SIR HENRY AYERS AND OTHERS . . . . DEFENDANTS.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

South Australian Insolvent Act, 1860, *Division VI.—Assignee in Bankruptcy—Transfer of Shares—Option of Assignee to accept or reject Shares—Liability of Transferor.*

Although the transferee of shares in a company formed under the *Companies Act*, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against all liabilities in respect of them subsequent to the date of the transfer; yet in the case of such transferee taking such shares as assignee in bankruptcy, taking the bankrupt's whole estate by operation of law, or as trustee under the provisions of the *South Australian Insolvent Act*, 1860, he has the option of accepting or rejecting the same. Acceptance of the shares in the absence of any special act done in relation thereto is not constituted by the execution of the deed of transfer, the acceptance of the trusts, and general action under them.

It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents that the assignees taking the property for division amongst the creditors should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency.

APPEAL from an order of the Supreme Court of *South Australia* (Oct. 9, 1876), affirming an order of the Primary Judge in Equity of the said Court (Aug. 29, 1876), allowing a demurrer of four of the Respondents to the Appellant's re-amended bill of complaint; also from an order of the Supreme Court (Dec. 19, 1876) affirming an order of the Primary Judge (Oct. 6, 1876), allowing a similar demurrer on the part of the two remaining Respondents.

The main question decided by the appeal was as to the operation and effect, under the circumstances stated in the Appellant's

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

re-amended bill of complaint, of the indenture of the 23rd of February, 1867, referred to in the judgment of their Lordships.

The facts of the case are sufficiently stated in the said judgment, which is printed below.

The most material allegations of the bill were to the effect (*a*) that the Respondents accepted 1125 shares in the *New Zealand Banking Corporation* as part of the assets of the firm of *Levi & Co.*, which they were bound to realize and dispose of for the benefit of the joint creditors; (*b*) that the Respondents had assets in their hands from the realisation of the joint estate of the partners far more than sufficient to satisfy all calls and interest in respect of the 1125 shares in the course of the winding-up, but they had wholly refused to pay the same, and the bill prayed to the effect that the Respondents might be ordered to indemnify the Appellant against all such calls and interest (1) as trustees of the two trust deeds out of the joint estate of the partnership firm, or (2) as trustees of the trust deed of the 23rd of February, 1867, out of the estate of the Appellant, or (3) as trustees of the two trust deeds out of the joint estate of the partnership firm after payment of partnership creditors, and (4) in case the deed of the 23rd of February, 1867, should be held not to be valid, then out of the joint estate of the firm in priority to and without resorting to the separate estate of the Appellant.

On the 12th of August, 1875, the Respondents *Ayers*, *Smith*, *Giles*, and *Smeaton* filed a joint and several demurrer to the bill, and on the same day the Respondents *Douglas* and *Townsend* also filed a separate joint and several demurrer thereto.

Each of the demurrers specified two grounds of demurrer, viz., (*a*) want of equity, and (*b*) want of jurisdiction; and the memoranda of points intended to be relied on by the said Respondents respectively on the argument of the demurrers were in each case the same, except that the Respondents *Douglas* and *Townsend* raised the additional point that they had ceased to be trustees of the two trust deeds before the commencement of the action, and that the bill shewed no interest in them respectively.

The primary Judge in giving his judgment stated that he founded his judgment on the point that the assignees, whether the said two trust deeds be considered as deriving force from the

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Insolvent Act, 1860, or as simply being deeds of assignment without that statutory aid, had the right to elect to take the 1125 shares or reject them, and that it was incumbent on the Appellant to shew by his bill an acceptance of the shares on the part of the trustees, but that the Appellant had failed to do that.

The following is the material passage of the judgment of Mr. Justice *Gwynne,* the primary Judge :—

"To this bill the Defendants demur for want of equity, and by the 9th paragraph of their demurrer they object to the bill,—That it does not appear by the said bill that all or any of these Defendants, as trustees of both or either of the indentures, separately or jointly with any other person or persons or otherwise, elected to take or accept either directly or constructively in equity the 1125 shares, and that the circumstances set forth in the said bill do not constitute, nor do they prove, a taking to the said 1125 shares, or an acceptance thereof by all or any of the Defendants in equity, and that all the circumstances constituting or manifesting the alleged constructive acceptance relied on must be set forth therein, and that these Defendants cannot, nor can any of them, be deemed in equity to have accepted the said 1125 shares, unless they, or some of them, have done some act which unequivocally indicates their or his intention to accept them, and no such act is stated in the said bill. Now it appears to me that the first question which arises on the above 9th point of the Defendant's memorandum of demurrer is, Were the trustees bound to accept the shares, or were they at liberty to waive them? I have always understood that it was a general principle of law that assignees are not bound to take what Lord *Kenyon* called a *damnosa hæreditas* property of the bankrupt, which, so far from being valuable, would be a charge to the creditors, but that they may make their election (see *Eaton* v. *Jaques* (1), *Bourdillon* v. *Dalton and Others* (2), and *Turner* v. *Richardson* (3)). In my opinion, therefore, the trustees had an option either to accept the shares or repudiate them. Another question then arises,—Does the Plaintiff, by the 23rd paragraph of his bill, sufficiently aver an acceptance in fact by the trustees? No doubt he alleges an acceptance as an inference of law, but it

(1) Doug. 461. (2) 1 Esp. N. P. Cas. 233.
(3) 7 East, 335.

seems to me that the facts from which that inference is drawn do not warrant it. The Plaintiff avers that, at the time of signing the deeds of trust, the trustees knew that the banking corporation had been ordered to be wound up, that, however, surely was not encouraging to them. There is no allegation that the trustees ever gave the Plaintiff notice that he was to hold the shares as a trustee for them, no allegation of a demand of the certificates of shares, nor even that they made any inquiries about the shares. The statement in the 23rd paragraph is simply an expansion of the allegation that the trustees took the shares by assignment; there is no doubt as to that, for they were necessitated to this, the *Local Insolvent Act*, 1860, requiring a *cessio bonorum*. There are several other objections raised by the bill against the operation of the deeds of assignment, such as that the Plaintiff was domiciled in *England;* that he executed the deed of the 23rd of February, 1867, by letter of attorney; and that both the deeds improperly contain a power of appointment of new trustees without the necessity of an application to the Court of Insolvency, and even without its privity; and that the present Defendants, or several of them, derive their character of trustees through the exercise of the objectionable power. Upon these objections the Plaintiff sets up an equity as against the trustees to be indemnified from all liability in respect of the 1125 shares, out of money now in the hands of the trustees, arising from the sale of the partnership estate. And he puts his claim alternatively, either directly against the joint estate or his own separate estate, augmented to the extent necessary by his claim of indemnity as against the late firm. These objections, however, are not, of course, urged against the deeds as assignments, but only against their character as deeds under Division VI. of the *Local Insolvent Act*, 1860. These objections, if coming from a creditor who had not come in under the deed or assented to it, and whom it was sought to fix against his will as a person bound by the deed, would be very cogent indeed, probably unanswerable, but coming from the Plaintiff after the assets have been realized, and the funds (except a small portion) divided amongst the creditors, and after an acquiescence of some nine years, cannot, in my opinion, be listened to in any Court of Equity. The difficulties of the Plaintiff's position arise from the

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circumstance that the *New Zealand* Corporation did not come in under the deeds. The corporation was in liquidation before the deeds of assignment were executed, and by the 180th section of our *Local Insolvent Act*, 1860, all persons coming in under these deeds are subject to the law of insolvency, and by the Act all foreign creditors can prove. The corporation, as it appears to me, had the right, under the 73rd section of the local *Company's Act*, 1864, to come in under the deeds and to make the trustees contributories instead of the Plaintiff. If that course had been taken all would have been well, but, under the events that have happened, I take it that the right of the Plaintiff as against the other three, in respect of indemnity, remains precisely as it was before the assignments were executed. I found my judgment, however, upon this point, that the assignees, whether the deeds be considered as deriving force from the *Insolvent Act*, 1860, or as simply being deeds of assignment without that statutory aid, the trustees had the right to elect to take the 1125 shares or reject them, and that it was incumbent on the Plaintiff to shew by his bill an acceptance of the shares on the part of the trustees, but this, as it appears to me, he has failed to do."

No judgment was delivered by the full Court on appeal, but the order of Mr. Justice *Gwynne* was affirmed by the Court without costs.

Sir *Henry Jackson*, Q.C., and Mr. *W. Barber*, for the Appellant, contended that the deed of the 23rd of February, 1867, was not intended to operate as a statutory deed, but at common law. It was a mere deed *inter partes*, and in no way derived its operation from the *Insolvent Act*, 1860. It was not a valid deed under Division VI. of that Act, inasmuch as it was executed by the Appellant by power of attorney, and not personally, and at the date thereof the Appellant was not resident or domiciled in *South Australia*, or subject to the jurisdiction of the Court of Insolvency. Consequently, the deed not being a statutory deed, did not give to the trustees an option to reject or accept the said shares. On the contrary, the deed transferred the beneficial interest in the shares to the trustees, who took them *cum onere*. The Appellant became from the date of the deed a bare trustee of such shares for

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the trustees of the deed, and was entitled to be indemnified against any liability in connection with such trust. Neither did the deed of the 17th of September, 1866, confer on the trustees any such option. The trustees included the shares in that earlier deed under the belief that they were then of value, notwithstanding the liquidation of the corporation, and in that way exercised the option of accepting them. In the later deed they again elected to accept the beneficial ownership of the said shares by including them in the assignment contained therein, thereby ratifying the assignment contained in the earlier deed. Under those circumstances, the allegations contained in the bill entitled the Appellant to the relief prayed. Reference was made to *Castellan* v. *Hobson* (1); *White* v. *Hunt* (2); *How* v. *Kennett* (3); the *Companies Act* of 1862 (25 & 26 Vict. c. 89), ss. 77, 180, 105; *Porter* v. *Kirkus* (4); *Walker* v. *Bartlett* (5); *Copeland* v. *Stephens* (6).

Mr. *Benjamin*, Q.C., and Mr. *Romer*, for the Respondents, contended that the two deeds of 1866 and 1877 were valid and legal deeds within the provisions of Division VI. of the *Insolvent Act*, 1860, notwithstanding the objections to them raised on the other side. In any case, as between the Appellant and the trustees, they must be taken to place the trustees on the same footing as assignees under a regular bankruptcy or insolvency. It cannot be contended that when a man makes a deed of the character of those under discussion, such deed vests in his assignees everything he puts in the schedules thereto, the latter being bound to take any and every item therein, even though it eats up the whole estate of the insolvent. As regards the shares in this banking corporation it had been ordered to be wound up, and in a winding-up the liability for future calls is a debt, *debitum in præsenti, solvendum in futuro*. Consequently the Appellant was a debtor to the company in respect of these shares at the time he executed the deed of 1867, and the official liquidator could have proved against the insolvent estate the estimated liability of the insolvent in respect of future calls. Reference was made to the *Companies Act* of 1862, ss. 75,

(1) Law Rep. 10 Eq. 50.
(2) Law Rep. 6 Ex. 32.
(3) 3 Ad. & E. 659.
(4) Law Rep. 2 C. P. 590.
(5) 25 L. J. (N.S.) (C.P.) 263.
(6) 1 B. & Ald. 593.

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76, and 77, and the cases cited under the sections in *Buckley's* Treatise on the Companies Acts (2nd Ed.). See also p. 172: "But where the bankruptcy, or that which is equivalent to the bankruptcy of the shareholder, is subsequent to the winding-up of the company, the liquidator (whether the company be registered or unregistered) is entitled to prove for the amount of the shareholder's liability against his estate, and the assignees or trustees of the estate are to be inserted in the list of contributories in lieu of the bankrupt; and this whether the bankrupt be liable as an A or a B contributory, and if as a B contributory, whether the B list have or have not been made out at the date of the bankruptcy."

Reference was made to *Hubbersty* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (1); *Turner* v. *Nicholls* (2); *Wilkins* v. *Fry* (3); *Bannatyne* v. *Leader* (4); *Hemming* v. *Maddick* (5); *Turner* v. *Richardson* (6); *Copeland* v. *Stephens* (7).

Sir *H. Jackson*, Q.C., replied.

1878 May 28.

The judgment of their Lordships was delivered by

SIR BARNES PEACOCK:—

The questions to be determined in this case are raised by two appeals which have been consolidated. One is an appeal from an order of the Supreme Court of *South Australia* in Equity, dated the 9th of October, 1876, which affirmed an order of the primary Judge of the same Court, dated the 29th of August, 1876, allowing a demurrer put in by the Defendants, Sir *Henry Ayers*, *Robert Barr Smith*, *Thomas Giles*, and *Thomas Drury Smeaton*, to the re-amended bill of the Plaintiff. The other is an appeal from an order of the said primary Judge, dated the 19th of December, 1876, by which, after disallowing the objection of the other Defendants, *William Selby Douglas* and *William Townsend*, that they were improperly made parties to the suit, he allowed their demurrer to the re-amended bill for want of equity. The case,

(1) Law Rep. 2 Q. B. 59, 171.
(2) 16 Sim. 565.
(3) 1 Mer. 265.
(4) 3 My. & Cr. 379.
(5) Law Rep. 7 Ch. 395.
(6) 7 East, 335.
(7) 1 B. & Ald. 604.

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therefore, of all the Defendants is now the same, the question being whether any case for equitable relief has been made against them, and that question must, of course, be determined upon the facts stated in the re-amended bill.

These facts may be shortly summarized as follows:—

The *New Zealand Banking Corporation, Limited*, was a duly incorporated company under the imperial statute known as "the *Companies Act*, 1862." On the 2nd of June, 1866, an order was made by the Court of Chancery for winding up that company, under which an official liquidator was appointed, and other proceedings were had in conformity with the statute. At the date of the winding-up order, and for some time previously, the Plaintiff, *Frederic Levi*, was the registered owner of 2070 shares in this *Banking Corporation Company*, of which 1125 were held by him as the nominee and trustee of the firm of *Philip Levi & Co.*, out of whose assets 1*l.* had been paid on each of such last-mentioned shares, the shares being accordingly treated as, and being, in fact, part of the partnership assets. The firm of *Philip Levi & Co.* consisted of the Plaintiff, *Philip Levi*, *Edmund Levi*, and *Alfred Watts*, and carried on the business of merchants, both in the City of *London* and at *Adelaide* in *South Australia*, the business being managed in *London* by the Plaintiff alone, and in *South Australia* by his three partners above-named. In September, 1866, *Philip Levi & Co.* became insolvent, and on the 17th of that month the three Australian partners executed a deed for the benefit of their creditors, purporting to be a deed made under the provisions of Division VI. of the Colonial "*Insolvent Act*, 1860." On the 23rd of February, 1867, a similar deed was executed in the name of the Plaintiff, under a power of attorney, dated the 1st of December, 1866, which had been sent out by him from *London* for that purpose. The effect of the two deeds was to vest the joint assets of the firm, and the separate estates of the respective partners therein, in the Defendants, Sir *Henry Ayers*, *William Selby Douglas*, *Robert Barr Smith*, and *William Townsend*, as trustees for the creditors; and in the schedule of the property assigned, which was annexed to each deed, were included the before-mentioned 1125 shares in the *New Zealand Banking Corporation*, estimated at the value of £1090 2*s.* 5*d.* The bill admitted that

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these deeds were duly executed, and were in all respects, valid and legal deeds in conformity with the Colonial "*Insolvent Act*, 1860," with respect to arrangements between debtors and creditors by deed, except, as regards both, in so far as the power to trustees to retire, and of appointing new trustees, contained in such deeds might not be authorized by the Act; and, as regards the latter deed, in so far as such deed might not be valid as a deed under the Act, by reason of its having been executed under a power of attorney, or by reason of the fact that the said *Frederic Levi* was resident and domiciled out of *South Australia*.

The bill also suggested a further objection to the later deed, which was probably intended to apply to both, viz., that the power to appoint new trustees could not be exercised consistently with the Act without the sanction and approval of the Court of Insolvency or the creditors of the insolvents. The power of the trustees to retire and to appoint new trustees was exercised on several occasions, and, as the bill alleges, without the express "sanction or approval of the Court of Insolvency, or of the creditors of the parties to the said trust deeds, or of either of them." The general result was that two of the original trustees, the Defendants *William Selby Douglas* and *William Townsend*, retired, and the Defendants *Thomas Giles* and *Thomas Drury Smeaton* became new trustees under both deeds.

The 23rd paragraph of the bill, upon which much stress has been laid, after stating that at the respective times when the two creditors' deeds were executed the trustees knew that the banking corporation was in a state of liquidation, and that the official liquidator was pressing the firm of *Philip Levi & Co.* in connection with certain credits which that firm had obtained from the corporation, proceeds thus:—

"It was at the commencement of the liquidation anticipated that after payment of all the creditors in full there would be a considerable sum divisible amongst the shareholders. The said shares were consequently included in the said trust deeds as a valuable item of property, which the debtors were bound to specify and to assign over for the benefit of the creditors. The second schedules to both the aforesaid deeds were respectively prepared, so far as the *London* assets were concerned, from a statement of

affairs brought out by Mr. *Edmund Levi*, who left *London* for *Adelaide* in the month of May, 1866, and the Defendants never raised any objection to the shares being comprised in the said deeds; and the Plaintiff charges that under the circumstances they must be deemed in equity to have accepted, and that they did in fact accept, the said shares as part of the assets of the said partnership, which they were bound to realise and dispose of for the benefit of the joint creditors, and that they cannot now repudiate any liability which has subsequently arisen in respect thereof."

Whatever may have been the anticipated result of the liquidation of the *New Zealand Banking Corporation* in 1866, the actual result was far from favourable; the Plaintiff was placed on the list of contributories, and has become personally liable, as between himself and the official liquidator, to pay calls on the 1125 shares, to the amount of £6187. 10*s.* 10*d.*, with interest running from different dates; and also to pay any future calls that may be made upon him as a contributory. The shares are still standing in the Plaintiff's name on the register of members of the company. The *New Zealand Banking Corporation, Limited*, was not included in the schedules to the trust deeds as a creditor in respect of the calls, and has not assented to the deeds, or been admitted to prove as a creditor thereunder; and the Plaintiff, "except so far as he is protected, if at all, by the trust deed of the 23rd of February, 1867, continues liable to satisfy the said calls." The 37th paragraph of the bill states that the "writ is instituted with the authority and by the directions of the official liquidator of the banking corporation for the benefit of that company." On those facts the bill prayed:—

1. For a declaration that the Defendants, as trustees of the joint estate of *Philip Levi & Co.*, were liable, out of such joint estate, to pay the present arrears of calls and all interest thereon, and any future calls that might be made in respect of the said 1125 shares, and thereout to keep the Plaintiff indemnified against all actions, suits, &c., for or in respect of the said shares or any of them; and an order for payment in accordance with such declarations; or,

2. For a similar declaration in respect of the separate estate of

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the Plaintiff, and an order for payment in accordance therewith; or,

3. For a similar declaration and order in respect of the surplus of the joint estate, after the payment thereout of the partnership creditors; or,

4. Only in case the second deed should be held not to be a valid and subsisting deed under Division VI. of the *Insolvent Act*, 1860, for a like declaration and order in respect of dividends upon the debt created in respect of the said shares, treating such debt as a debt proved or proveable against the joint estate.

The equity of the Plaintiff, if any, against the trustees must be founded upon these two propositions, or one of them, viz.: 1st. That the transferee of shares in a company formed under the *Companies Act*, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against all liabilities in respect of them subsequent to the date of the transfer; 2nd. That a trustee whose name is on the register, though personally liable as a shareholder, is entitled to be indemnified by his *cestui que trust*.

These propositions, as general rules, are indisputable. Their application, however, and particularly that of the first, to the present case depends upon various considerations of greater or less nicety.

In what way can the trustees be said to have become the transferees of these shares, taking the beneficial interest thereof? Simply by having executed and acted under two deeds, in the nature of a *cessio bonorum*, for the benefit of creditors, which assigned that beneficial interest, together with all the other property of the insolvent debtors.

That the law makes a distinction between persons taking an assignment of shares or the beneficial interest therein by way of contract and under an ordinary deed, and the assignees of a bankrupt or insolvent who take his whole estate by operation of law, is clearly established. The reasons for the distinction are pointed out by Sir *William Grant* in his judgment in the case of *Wilkins* v. *Fry* (1), though the question in that particular case was whether the assignees of a bankrupt who had sold his leasehold property had a right, independently of positive stipulations, to

(1) 1 Mer. 244.

require from their vendor an indemnity against the covenants in the lease. In *Turner* v. *Richardson* (1) and other cases it was treated as settled law that assignees in bankruptcy are not bound to accept a *damnosa hæreditas*, and that they have consequently an option to accept or to repudiate property which is or may be injurious to the estate.

The substantial question, therefore, in this case is whether the trustees are to be treated as the assignees of shares under an ordinary deed, or as persons taking in the character and with only the rights and liabilities of assignees under a bankruptcy or an insolvency.

It appears to their Lordships that in deciding this question they ought to look to the substance rather than to the form of the transaction; to the nature of the functions undertaken by the trustees rather than to the machinery by which those functions were created.

By the *Colonial Insolvent Act*, 1860, Division VI., commencing at sect. 172, provisions are made with respect to arrangements by deed between debtors and their creditors; and it is enacted by that section that any debtor may, by deed containing the particulars, and executed and attested as thereinafter provided, convey and assign to trustees his estate and effects for the benefit of his creditors. By sect. 179 every such deed is rendered binding and effectual in all respects upon the creditors who shall not have signed the deed as if they had duly signed the same, and vests in the trustees the property of whatever kind or wherever situate of the debtor, including all debts due to him, upon the trusts and for the purposes in and by such deed declared, and such trustees are authorized to recover the property and debts in their own names as trustees for the estate of the debtor in like manner as assignees in insolvency.

Sect. 172 enacts that every such deed shall be executed by the debtor, and also by the trustees thereof, within seven days of such execution by the debtor, and by each of them in the presence of a practitioner of the Supreme Court, a justice of the peace for the said province, or a clerk of a local Court, and that each witness shall attest such deed, and specify the date on which the execution

(1) 7 East, 335.

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so attested was made. It was also enacted by sect. 174 that every such deed shall contain in a schedule annexed thereto a true and particular account of all the property of the debtor, subject to certain exceptions not material in this case, and shall also contain in a like schedule the names of the several creditors of the debtor, and the amount due, or supposed to be due, to them, respectively.

Their Lordships entertain no doubt that trustees under trust deeds which fall strictly within the provisions of the Colonial Statute, stand in respect of the point under consideration upon the same footing as assignees under a regular bankruptcy or insolvency, and have the same option of either accepting or repudiating such shares as are in question in this suit.

It was indeed contended on behalf of the Plaintiff that the express declaration in the deeds that it should be lawful for the trustees to refuse to accept any lease, or agreement for a lease, or any agreement for the purchase of lands, which the trustees should deem not to be beneficial to the creditors, impliedly restricted the trustees from refusing to accept shares or any other description of property; but their Lordships are of opinion that it had no such effect. The declaration was introduced rather to limit the general right of refusal which the law would otherwise have allowed the trustees, by requiring them to state such refusal in writing within fourteen days after being called upon to elect whether they would accept or refuse property of the description therein specified.

A question however arises on the bill whether the two trust deeds in this case were deeds within the provisions of the sixth division of the *Insolvent Act*, 1860.

These deeds were framed with a view to the administration of the insolvents' estates under the statute; and were formally executed in accordance with its provisions; the estate has been so administered, and their Lordships are not prepared to say that any of the objections suggested by the bill, viz., the insertion of a power to allow the trustees to retire, and to replace them by new trustees; the exercise of that power without the express sanction of the Insolvent Court, or the domicil of the Plaintiff, and the execution of his deed under his power of attorney, are, any of them, fatal to the character of the deeds as deeds under the sixth

division of the *Insolvent Act*, 1860. But whatever might have been the weight of any of these objections, if taken at the proper time by a non-assenting creditor, their Lordships agree with Mr. Justice *Gwynne* in the conclusion that they cannot prevail when proceeding from the mouth of the Plaintiff. They must, therefore hold as between him and the trustees that the latter had, in respect of the shares, the same option of acceptance or repudiation as would have belonged to ordinary assignees under a regular bankruptcy or insolvency. Have they then exercised that option by taking to the shares? Their execution of the deeds, their acceptance of the trusts, and general action under them, do not of themselves constitute such a taking to, or acceptance of this particular asset. The insolvent estate has never derived the slightest benefit from it, and could not have done so, since the shares have turned out to be worse than worthless, and are now treated as creating a liability instead of a benefit. The trustees have never done any special act in relation to them, and the legal title to them remains as it was before the execution of the deeds. The cause, however, comes on upon demurrer, and it is, therefore, necessary to consider the effect of the allegations in the 23rd paragraph of the bill which has been already cited. Their Lordships agree with Mr. Justice *Gwynne* that this paragraph imports not an allegation that the trustees did in point of fact accept the transfer of the shares, but merely the charge of a conclusion in equity from the facts stated in the bill, a conclusion which is erroneous if the trustees had the option which their Lordships have decided that they had.

It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents, that the assignees, taking the property for division amongst his creditors, should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency. The subject was fully considered by Sir *William Grant* in the case of *Wilkins* v. *Fry* (1) above referred to.

(1) 1 Mer. 244.

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These considerations appear to their Lordships to be a sufficient answer to any claim of the Plaintiff against the trustees for payment or indemnity out of the joint estate of *Philip Levi & Co.*, or out of the separate estate of the Plaintiff.

The trustees have incurred no liability to indemnify the Plaintiff out of the assets to be administered by them or otherwise. Their duty is to apply the assets in payment of the joint and separate creditors, and to hand over the surplus, if there be any (of which there is no proof), to the insolvents.

The rights of the insolvents *inter se* cannot be dealt with in this suit. The official liquidator, and the company which he represents, have in this suit no higher rights than the Plaintiff, who states that he is suing for their benefit, and under their authority. It is unnecessary to determine whether they could or could not have come in under the insolvency, and entitled themselves to dividends on their claim out of either the joint or separate estate, because they have not so come in, or sought to make the requisite proof.

It appears, therefore, to their Lordships that the Plaintiff's suit wholly fails, and they will humbly advise Her Majesty to affirm the orders under appeal, and dismiss this appeal.

The Appellants must pay the costs of the appeal.

Solicitors for the Appellant: *Trinders & Curtis Hayward.*
Solicitors for the Respondent: *Torr & Co.*

[PRIVY COUNCIL.]

In the Matter of the ENDOWED SCHOOLS ACTS, 1869, 1873, and 1874.

J. C.*
1878
June 5, 6.

AND

In the Matter of a Scheme for the Administration of the Foundation known as the ENDOWED SCHOOL, founded by MARGARET HODGSON at Wiggonby, in the Parish of Aikton, in the County of Cumberland, by a Deed dated on or about the 19th day of October, 1792, and further Endowed under her Will dated on or about the 3rd day of April, 1797.

Endowed Schools Act, 1869, ss. 5, 11, 19, 23, 24—*Educational Endowment—Vested Interests.*

A direction in a deed of foundation that certain persons may be or continue at the school thereby founded after the age of manhood, does not make the endowment or any part of it less an "educational endowment" within the meaning of the *Endowed Schools Act*, 1869, ss. 5 and 24, than it would have been if no such privilege had been granted to those persons; the whole endowment being applicable "for the purposes of the education at school of boys or girls," and no part of it being applicable or applied to any "other charitable use."

Sect. 19 of the said Act prevents the Commissioners from making particular religious opinions more or less necessary than they were before to qualify generally for the office of governor under the scheme. It does not prohibit them from making the office of the rector of a parish a qualification for a place on the governing body of a Church of *England* school.

It is not *ultrà vires* the Charity Commissioners under sect. 23 of the Act of 1869 to provide in a scheme a species of visitatorial jurisdiction sufficient to indemnify the governors and to bind the objects of the Charity in reference to proceedings "under the scheme."

Scheme remitted to the Charity Commissioners, inasmuch as sufficient provision had not been made therein to satisfy existing educational interests according to the requirements of sect. 11 of the Act of 1869.

THIS was an appeal by the trustees of the above-named Foundation against a scheme framed by the Respondents, the Charity Commissioners for *England* and *Wales*, for the management

* *Present*:—Lord Selborne, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

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thereof, and approved by the Lords of the Committee of Council on Education, on the 18th of August, 1877.

By the above-mentioned deed of the 19th of October, 1792, which was duly enrolled in the High Court of Chancery, the above-named *Margaret Hodgson* conveyed certain hereditaments therein described unto and to the use of *Robert Hodgson*, *John Hind*, *John Wilkinson*, *Matthewman Hodgson*, *William Matthews*, *John Furnas*, *John Wilson*, *Joseph Hodgson*, and *William Barnes*, their heirs and assigns, upon trust out of the rents and profits thereof to erect or cause to be erected a good and sufficient school-house upon some part of the said hereditaments, and immediately after such school-house should have been erected and a sufficient schoolmaster should have been employed, to pay to such schoolmaster the sum of £40 per annum, clear of deductions, for teaching all persons of the name of *Hodgson* wherever they might come from during such time as they should respectively think fit and convenient to continue at the said school, and also to teach and instruct all poor persons' children within the parish of *Aikton* whose parents were not possessed of the real estate of £20 per annum, and all poor persons chosen within the parishes of *Burgh-by-Sands* and *Beaumont*, whose parents were not possessed of real estate of £12 per annum, in the principles of the Church of *England*, and to read, write, cast accounts, learn their catechism, and other proper and useful learning for the salary aforesaid, without receiving any money, or other gratuity, award, or present whatsoever from the said poor children or scholars, or their parents, relations, or friends. And upon further trust to pay yearly out of the rents and profits of the said hereditaments, to such of the said poor boys and girls within the said parish of *Aikton* as the said trustees or the major part of them should from time to time think proper, the sum of 20*s.* per annum each for or towards finding them necessary and comfortable apparel, and more in case of real necessity. And also to find necessary books for the education of the said children and scholars as often as occasion should require. And the said *Margaret Hodgson* thereby directed that the said trustees, or the major part of them for the time being, should have the full management of the said school, and that every schoolmaster thereof for the time

being, together with all his scholars, should go to the parish church of *Aikton* once in every Sunday, and there attend divine service, unless prevented by sickness or some other reasonable excuse, and that every rector or curate of the church aforesaid should, on some convenient Sunday in every year, catechise the said children, together with others, in *Aikton* church; and that no such poor boys or girls should be admitted into the said school before the age of eight years, or should continue there after the age of twenty-one years (except those of the name of *Hodgson*, who should continue there so long as they should respectively think fit and convenient as aforesaid). And the said *Margaret Hodgson* thereby gave directions for holding meetings of trustees, and empowered the said trustees to remove any master of the said school, and to elect another in his room, and to expel any of the said poor boys and girls, and directed that the residue of the said rents and profits should be applied and disposed of for the use and benefit of the said school, schoolmaster, and scholars as the said trustees or the major part of them, for the time being, should in their discretion think fit; and in the said deed are also contained certain provisions for the appointment of new trustees (to be resident within seven miles of *Wiggonby*, aforesaid), and for the conveyance to them of the said hereditaments.

The said *Margaret Hodgson* duly made her will, dated the 3rd day of April, 1797, and thereby, after bequeathing certain specific legacies, and an annuity of £20 per annum, which has long since determined, and after reciting the said deed, and (as the fact was) that a school-house had been erected upon part of the said hereditaments, bequeathed the residue of her personal estate to the then acting trustees of the Foundation upon trust to get in and convert the same into money, and to invest the proceeds as therein mentioned, and to apply the income thereof for the benefit of the school as they should think fit. In the will were provisions for the appointment of new trustees and conveyance of the trust estate, identical with the provisions in that behalf contained in the said deed, and it was further directed that no minister of the Gospel in holy orders should at any time be schoolmaster of the said school, or any of the trustees for the time being, and that no person holding land within the precincts

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or liberties of *Wiggonby* should at any time be chosen trustee of the said school. The testatrix appointed the acting trustees to be executors of her will.

A scheme for the management of the school was duly prepared by the Respondents in the year 1875, and published in the month of November of that year, but was subsequently altered to meet certain of the views of the Appellants, and others, and, as altered, was submitted to the Lords of the Committee of Council on Education. The Appellants then presented a memorial of their objections and suggestions relating to the scheme, but notwithstanding this the scheme was finally approved, without the consent of the Appellants, by the Lords of the Committee of Council on Education, on the 10th of August, 1877.

The material passages of the scheme, which were frequently referred to in argument and are mentioned in their Lordships' judgment, are as follows:—

"27. The parent or guardian of, or person liable to maintain or having the actual custody of, any day scholar may claim, by notice in writing addressed to the principal teacher, the exemption of such scholar from attending prayer or religious worship, or from any lesson or series of lessons on a religious subject, and such scholar shall be exempted accordingly. If any teacher in the course of other lessons at which any such scholar is in accordance with the ordinary rules of the school present, shall teach systematically and persistently any particular religious doctrine from the teaching of which any exemption has been claimed, as in this clause before provided, the governors shall, on complaint made in writing to them by the parent, guardian, or person liable to maintain or having the actual custody of such scholar, hear the complainant and inquire into the circumstances, and if the complaint is judged to be reasonable, make all proper provisions for remedying the matter complained of.

"28. The governors shall not be precluded by any provision in this scheme from conforming to any regulations which the Education Department under the *Elementary Education Act*, 1870, or under any authority, may impose as the conditions of a grant of money, provided that such regulations shall not be inconsistent with the provisions of the *Endowed Schools Acts*, 1869, 1873, and 1874.

"29, sub-s. (6). Any prize, scholarship, exhibition, or other payment for which there is no duly qualified candidate of sufficient merit shall for that occasion not be awarded, and any amounts so left not disposed of shall be carried to a separate account to be called 'The Suspense Fund,' and whenever the accumulations of such fund shall amount to £300 the governors shall apply to the Charity Commissioners for directions as to the disposal of the same."

"32. Within the limits prescribed by this scheme the governors shall have full power from time to time to make regulations for the conduct of their business and for the management of the foundation, and such regulations shall be binding on all persons affected thereby.

"33. Any question affecting the regularity or the validity of any proceeding under this scheme shall be determined conclusively by the Charity Commissioners upon such application made to them for the purpose as they think sufficient.

"34. If any doubt or question arises among the governors as to the proper construction or application of any of the provisions of this scheme, the governors shall apply to the Charity Commissioners for their opinion and advice thereon, which opinion and advice when given shall be binding on the governors and all persons claiming under the trust who shall be affected by the question so decided."

"37. Except as hereinbefore provided with regard to the exemption of day scholars from attending prayer or religious worship, or lessons on a religious subject, nothing in this scheme shall affect any legal requirement now in force respecting the religious instruction or attendance at religious worship of the scholars, or respecting the religious opinions of the governing body or masters of the foundation, or be taken to relate in any way directly or indirectly to such religious instruction, attendance, or opinions. Subject as aforesaid, from and after the date of this scheme, the foundation shall for every purpose be administered and governed wholly and exclusively in accordance with the provisions of this scheme, notwithstanding any former or other scheme, Act of Parliament, charter, or letters patent, statute, or instrument relating to the subject-matters of this scheme."

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Mr. *Wills*, Q.C., and Mr. *Latham*, for the Appellants, who were trustees of the deed and will before mentioned, and also the governing body of the endowments created thereby respectively, and of the school thereby established, contended that they were aggrieved by the scheme, first, because the school and endowments dealt with were not within the jurisdiction of the Commissioners under the above-named Acts. The endowments dealt with were partly applicable to the education of persons other than boys and girls within the meaning of the *Endowed Schools Act*, 1869, s. 5. In that respect, and so far as these endowments could be applied in that manner, they were withdrawn from the operation of that enactment by virtue of sect. 3 of the *Endowed Schools Act*, 1873. That would appear if the endowments, or their income, were apportioned under the Act of 1869, s. 24, regard being had to the terms of sect. 8. On the other hand, if the scheme is within the scope of sect. 24, and therefore of the Acts, it is nevertheless not made in conformity with the said Acts, no apportionment having been made thereby under sect. 24, although the school and endowments were partly applicable to charitable uses other than educational uses within the meaning of the Acts. The right of appeal was claimed under sect. 24 as well as under sect. 39.

Secondly, the Appellants were aggrieved because clause 3 of the scheme provided that the *ex officio* governor shall be the rector of *Aikton* for the time being, if he shall be willing to accept the office. That was a provision respecting the religious opinions of the governing body made without the consent of the Appellants, and therefore in contravention of sect. 19 of the Act of 1869.

Thirdly, they were aggrieved by clause 28, which did not comply with the requirements of sect. 19 of the Act of 1869 in protecting the provisions of the existing trust with respect to the religious instruction of the scholars and their attendance at religious worship. The Appellants had not consented to the clause. They referred to sect. 19 of the Act of 1869, and submitted that although clause 27 of the scheme complied with sect. 15 of the Act yet the power given to the governors by clause 28 of the scheme to conform to regulations which the Education Department may impose as the conditions of a grant

of money is such a provision as is forbidden by sect. 19. The Education Department might impose purely secular education as the condition of a grant; and even at present clauses 6 and 17 of the Code of 1877, now in force, import provisions as to religious instruction, &c., which are contrary to the existing trusts of these endowments. Under this scheme the school might be reduced to an elementary school within the meaning of the *Elementary Education Act*, 1870, and may then be transferred with its whole endowment to a school board under sect. 23 of that Act with the consequences entailed by sect. 14. They submitted that according to the true interpretation of the scheme, clause 28, as well as clause 27, was within the exception contained in clause 37, and that the present trusts for religious instruction and worship were consequently not protected by the saving provisions of clause 37.

Fourthly, the Appellants were aggrieved, inasmuch as due regard was not paid by the scheme to the vested educational interests of particular classes of persons. Though clause 29 appeared to protect such interests, yet clause 28, authorizing the governors to conform to clause 17 of the Code, enabled them to abrogate clause 29 to the detriment of the classes above referred to. Those classes were, "all persons of the name of *Hodgson*, wherever they may come from;" another, "all poor persons' children within the said parish of *Aikton* whose parent or parents are not seised and possessed of a real estate or estates in their or one of their own right or rights of £20 per annum;" another is, "all poor persons' children within the said parishes of *Burgh-by-Sands* and *Beaumont* whose parent or parents are not seised and possessed of a real estate or estates in their or one of their own right or rights of £12 per annum." The scheme did not sufficiently regard the educational interests protected by the Act of 1869, sect. 11, and the Act of 1873, sect. 5.

Fifthly, the Appellants were aggrieved because the scheme was not in conformity with the Acts above named in respect of clause 29 (sub-sect. 6), clause 33 and clause 34 conferring new and permanent jurisdiction on the Charity Commissioners. Under the Charitable Trusts Acts the Commissioners would have no jurisdiction in any of the matters concerning which peremptory jurisdiction is intended to be given them by the above-mentioned

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clauses, except on the application of the trustees, which application the trustees could make or withhold at their discretion; and the opinion and advice of the Commissioners, when obtained, would not be conclusive, as under clause 33 of the scheme, but subject to any judicial order or direction which might be subsequently made or given by any competent Court or Judge. The powers of the Commissioners under the above-named Acts will expire on the 31st of December, 1879, and the Appellants submit that there is nothing in the said Acts to authorize the said clauses in the scheme extending the ordinary jurisdiction and powers of the Commissioners after that date, and destroying the right of appeal.

Mr. *Davey*, Q.C., and Mr. *Romer*, for the Respondents, were not called upon in reference to two of the above contentions, viz., the first and third; but in reference to the fourth they contended that the Respondents in framing the scheme, had had regard to the educational interests of all persons or classes of persons whose privileges or educational advantages were thereby either abolished or in any way modified, or to whose educational interests the Respondents were bound by the Acts to have regard. Provisions were made by the scheme which would give greatly increased educational benefits to the inhabitants of the parishes of *Aikton*, *Burgh-by-Sands*, and *Beaumont*, by providing an education superior to that of ordinary elementary schools, and adapted to the needs of those parishes, while the exhibitions, scholarships, and payments provided by the scheme will be more beneficial than the gratuitous education and gifts of clothing and books, to which the endowments have hitherto been applied. As regards this contention, as also the second and fifth contentions of the Appellants, the Respondents' argument sufficiently appears in the following judgment.

Mr. *Latham* replied.

1878 *June* 6.

The judgment of their Lordships was delivered by

Lord Selborne:—

Five objections were taken by the Appellants, the governors of the *Wiggonby School*, to the scheme settled by the Charity Com-

missioners for the future administration of that foundation under the Endowed Schools Acts, as to two of which their Lordships did not think it necessary to hear the Respondents. They are clearly of opinion that the provision in the deed of foundation of the 19th of October, 1792, which permits persons of the name of *Hodgson* to be, or to continue, at the school after the age of manhood, does not make the endowment of this charity, or any part of it, less an "educational endowment" within the meaning of sects. 5 and 24 of the *Endowed Schools Act* of 1869 than it would have been if no such privilege had been granted to those persons, the whole endowment being applicable "for the purposes of the education at school of boys or girls," and no part of it being applicable or applied to any "other charitable use." If any adult persons named *Hodgson* at any time took advantage of the option given them to remain in the school, they did not become the subjects of a distinct and separate trust, but merely continued to participate with boys and girls in the benefits of an education intended for boys and girls as its ordinary recipients. And, with respect to the objection founded on the 28th clause of the scheme, their Lordships are of opinion that the clause is so worded as to make it impossible for the governors to do anything under it which is inconsistent with any provision of the Endowed Schools Acts. It was suggested that it might enable them, indirectly, to do hereafter what could not have been done directly by the scheme itself (unless by the consent of the Appellants, which was not given), without infringing the 19th section of the Act of 1869. But their Lordships (reading this clause, as they are bound to read it, in connection with another clause, that numbered 37 in the scheme) are of opinion that it would have no such effect.

There remain three other objections, which their Lordships will consider, not exactly in the same order in which they were presented to them.

The first relates to the appointment of the rector of *Aikton* for the time being as an *ex officio* governor, which was said to be a "provision respecting the religious opinions of the governing body," contrary to the concluding words of sect. 19 of the Act of 1869.

It has been decided by Her Majesty in Council that in cases

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falling within the 17th section of the same Act, the holder for the time being of an ecclesiastical office in the Church of *England* cannot lawfully be made an *ex officio* member of the governing body of an educational endowment; the Commissioners being by that section required to provide, in every scheme to which it is applicable, "that the religious opinions of any person shall not in any way affect his qualification for being one of the governing body." The ground of that decision may be presumed to have been that particular religious tenets are implied in, and are necessary conditions of, the tenure of an ecclesiastical office, and must, therefore, "affect the qualification," consisting in the incumbency of such an office.

The words at the end of sect. 19 are very different. They direct, not what a scheme shall, but what (without the consent of the existing governors) it shall not provide. What they prohibit is, not a qualification for a particular place on the governing body, which may be "in any way affected" by a man's religious opinions, but any provision "respecting the religious opinions of the governing body." And this occurs in a section relative to a particular class of denominational schools, of which it is intended to preserve (subject only to a conscience clause) the denominational character, and which, for that reason, are thereby expressly exempted from the operation of the 17th section, unless the existing governors consent that they shall be made subject thereto.

Their Lordships agree with the argument of the Respondents' counsel, that the object of the concluding part of sect. 19 was only to fortify the former part of the same section, and to prevent the Commissioners from making particular religious opinions more or less necessary, in these cases, than they were before, to qualify, generally, for the office of governor. This particular school is a Church of *England* school in the strictest sense; and by the law, as settled by the House of Lords in the *Ilminster School Case*, all the members of its governing body ought properly, before the scheme was made, to have been members of the Church of *England*.

No religious opinions are implied in the office of rector of the parish of *Aikton*, except those which, independently of the scheme, would have been held, by the Court of Chancery, to be necessary to qualify for the office of governor or trustee. In the plain and

natural sense of the words, "any provision respecting the religious opinions of the governing body," there is here no such provision; and to say that the office of rector shall not in this case be made a qualification for one place on that body, merely because the holder of that office must necessarily belong to the Church in the Catechism of which the children of this school are to be instructed (and instructed publicly in the church by the rector himself), and the worship of which they are required to attend, would, in their Lordships' opinion, be to contravene the spirit of the entire section by an unnecessary implication from the letter of this part of it.

Before leaving this point, it may be right to notice a passage in the will of the foundress, which was referred to in the argument, to the effect that it was her "meaning and desire that no minister of the Gospel in holy orders officiating at any church or chapel shall, at any time, be schoolmaster of the said school, nor any of the trustees for the time being." Their Lordships understand this passage, not as directing that no clergyman officiating at any church or chapel shall be a trustee, but that neither any such clergyman, nor any one of the trustees for the time being, shall ever be schoolmaster of the school.

The objection with which their Lordships think it convenient next to deal had reference to the 33rd and 34th clauses of the scheme, which were said to confer upon the Charity Commissioners larger powers of deciding questions arising under the scheme, and binding all persons interested by such decisions, than belong to them by law under the Acts defining their general powers as to charities; and it was suggested that such larger powers were in excess of the objects for which the Commissioners were authorized to provide by schemes under the Endowed Schools Acts. Their Lordships are not satisfied that the difference between these particular clauses and the general powers of the Commissioners is a really substantial one, or is at variance with the spirit and general intention of the Acts by which those powers are conferred; but taking that difference to be as great as it was contended to be by the Appellant's counsel, it does not follow that these clauses are therefore *ultrà vires*. The 23rd section of the Act of 1869 authorizes the Commissioners to insert in any scheme "all powers and

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provisions that may be thought expedient for carrying its objects into effect;" and their Lordships have reason to believe that these particular clauses are in a common form, which has been adopted in many schemes for other endowed schools already approved by Her Majesty in Council. Their purpose, that of establishing in the Commissioners, with respect to the cases for which they provide, a species of arbitral or visitatorial jurisdiction, sufficient to indemnify the governors and to bind the objects of the charity within certain limits, may reasonably have been thought expedient for carrying the objects of the scheme into effect. And it is to be observed that they relate only to questions affecting the regularity or the validity of proceedings "under the scheme," and as to the proper construction or application of the provisions "of the scheme." Their Lordships, after full consideration, are of opinion that it cannot be held to be *ultrà vires* of the authority by which the scheme itself was made, so to provide for the settlement of questions of this nature arising under that scheme.

The objection which their Lordships have reserved for consideration in the last place, arises under the 11th section of the Act of 1869, which is thus worded:—"It shall be the duty of the Commissioners, in every scheme which abolishes or modifies any privileges or educational advantages to which a particular class of persons are entitled, and that whether as inhabitants of a particular area or otherwise, to have due regard to the educational interest of such class of persons." The 39th section of the same Act makes any scheme, "not having due regard to any educational interests" in the cases contemplated by this 11th section, the proper subject of an appeal (by the governing body) to Her Majesty in Council.

The Appellants say, that in the present scheme due regard is not had to the educational interests of three classes of persons who have hitherto, under the deed and will of the foundress, enjoyed special privileges or educational advantages, which will be abolished or modified by the scheme, viz:—(1.) All persons of the name of *Hodgson*, whencesoever coming, who may think fit to attend this school; (2.) All children of poor persons within the parish of *Aikton* not having real estate worth £20 per annum; and (3.) All children of poor persons within the parishes of

Burgh-by-Sands and *Beaumont* not having real estate worth £12 per annum. By the deed and will the benefits of the foundation were open to these three classes of persons (under some limitations, as to age, affecting the two latter of them), and to them alone. The objection is, that the scheme supersedes all provisions of the deed and will by which these privileges and advantages were conferred, and makes its own provisions the sole rule (subject to an immaterial exception in clause 37) for the future administration of the charity; and that there is no provision in any part of the scheme by which any educational interests of any of these classes of persons are directly or indirectly regarded, except the 29th clause. That clause gives certain opportunities of competing for scholarships or exhibitions to boys or girls educated either in the school of the foundation, or in "some elementary school in any of parishes mentioned in the schedule" (being ten parishes in *Cumberland*, of which *Aikton*, *Burgh-by-Sands*, and *Beaumont*, are three), with an absolute preference, as to scholarships, of duly qualified candidates from the school of the foundation, and a *cæteris paribus* preference, as to exhibitions, of candidates from the school of the foundation, or from "an elementary school in the parish of *Burgh-by-Sands* or of *Beaumont*."

Their Lordships are of opinion that unless, upon the true construction of the scheme, children of the three classes who were the objects of the foundress' bounty are still admissible, as of right, upon fair and equitable terms, to the school itself, due regard has not been had to their educational interests by merely giving them these occasional chances of competing, when educated elsewhere, for scholarships and exhibitions. Their Lordships do not doubt that it was intended by the Commissioners (as they have been assured by the Commissioners' counsel at the bar) that all such children, if resident within such a distance as might be consistent with their attending the school as day scholars (and indeed all other children, whether of the three parishes favoured by the foundress or of any others who might be able to do so) should be admissible to the school under such reasonable regulations as the governing body might from time to time make. And if it were clear that the scheme had provided for this, their Lordships would have thought that sufficient regard had been shewn

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to the educational interests of those classes (although their exclusive privileges would have been abolished), subject only to the question whether they ought, under any circumstances, to have priority in the order of admission to the school. But the difficulty is, that the scheme nowhere directly says what children—of any classes or class whatever—are to be admissible to the school, and contains no rules whatever as to their admission. All this seems to be left to the governors. The capacity of the school buildings (which are to be enlarged) is, indeed, to be "suitable for not less than 100 day scholars," and it may be inferred, from clauses 24, 25, and 28, that the Commissioners had in view the general character and conditions of a public elementary school, capable of receiving the benefits provided for such schools by the *Elementary Education Act* of 1870. But even if the *Elementary Education Act* of 1870 could for this purpose be referred to, there is nothing in that Act which, being read into this scheme, would shew that children from the parishes of *Burgh-by-Sands* and *Beaumont*, or persons of the name of *Hodgson* not residing in the parish of *Aikton*, would be admissible, as of right, to the school. There being nothing to that effect in the scheme, the very large powers of making regulations, conferred upon the governors by clause 32, would seem to enable them (if they should think fit) to exclude these classes of children, or some of them; or, at all events, to decline to recognise them as entitled of right to the benefit of the charity. It may be that, as the school buildings are situate in the parish of *Aikton*, there would be a necessary inference in favour of the right of poor children of that parish; but their Lordships do not see how, without falling back on the directions (which are exclusive) contained in the deed and will of the foundress, such an implication could be extended to children from the other two parishes, or to persons of the name of *Hodgson* not resident in *Aikton*.

Their Lordships, therefore, have come (though reluctantly) to the conclusion, that there is not in this scheme enough to satisfy the requirements of the 11th section of the Act of 1869; and they think it their duty to advise Her Majesty to remit it to the Charity Commissioners for amendment; with a declaration, that, in its present form, it is defective, as not having due regard to the

educational interests of the several classes of persons who were entitled, under the deed and will of the foundress, *Margaret Hodgson*, to the privileges or educational advantages which it is intended to abolish or modify.

Although it would not, in their opinion, be proper, by Her Majesty's Order, to give any further directions for the government of the Commissioners, it may be useful for their Lordships to add, that they do not adopt the view that any new privilege, preference, or exclusive advantage need be given, by any scheme under these Acts, to a class originally favoured, when the Commissioners think it right to abolish the original privilege or advantage. In the present case, it appears to them, that if children named *Hodgson*, who can conveniently attend the school as day-scholars, and children from the three parishes originally favoured, are recognised as entitled to be educated, under reasonable regulations, in this school, no preference or advantage need be conferred upon them beyond this, that, as the school is to be limited to 100 children, it may probably be right to give them priority of admission, *cæteris paribus*, if the number of duly qualified applicants for admission should at any time exceed the number of vacancies for the time being in the school. As to age, and as to examination (if the governors should think it right to submit candidates for admission to a competitive or any other kind of preliminary examination), their Lordships see no reason why they (the *Hodgsons* included) should not be placed on exactly the same footing with other children, not of the favoured classes; who may, if found better qualified in these respects, be admitted in preference to them. And their Lordships think that due regard may well be paid to the educational interests of the *Hodgsons*, without allowing them to remain in the school beyond the age which may be limited as to other scholars.

Their Lordships do not think that this is a case which either the Appellants or the Respondents ought to be ordered to pay costs.

Solicitors for the Appellants: *Bell, Brodrick, & Gray.*
Solicitors for the Respondents: *Farrer, Ouvry, & Co.*

[PRIVY COUNCIL.]

J. C.* 1878 June 6.

In the Matter of the ENDOWED SCHOOLS ACTS, 1869, 1873, and 1874,

and

In the Matter of a Scheme framed by the Charity Commissioners for England and Wales, for the Administration of the Foundation at Haydon Bridge, in the County of Northumberland, known as the CHARITY OF JOHN SHAFTOE, of Nether Warden, in the same County, Clerk.

Endowed Schools Act, 1869, *ss.* 13, 39—"*Vested Interests.*"

A petition having been presented against a scheme of the Charity Commissioners relating to certain endowed schools by some inhabitants and ratepayers, on the ground that they and the class represented by them had a right by the founder's deed to have their children taught free of expense in the school, and that this right would be taken away or subjected to change by the scheme:—

Held, that the appeal could not be entertained. No individual petitioner complained that he had a child at the school whose *status* would be interfered with; and the general interest of the class under the founder's will did not come within the category of "vested interests" saved, or required to be saved, by the *Endowed Schools Act*, 1869.

THIS was an appeal in relation to certain schools at *Haydon Bridge*, in the county of *Northumberland*, called the "*Shaftoe's Charity*," which were founded by a deed dated in 1685, and were regulated by two Acts of Parliament passed respectively in 1785 and 1819, being 25 Geo. 3, c. 34, and 59 Geo. 3, c. 48.

In January, 1870, the trustees of the said charity submitted to the Commissioners appointed under the *Endowed Schools Act*, 1869, a draft scheme for the application of the educational endowment of the said charity.

By this draft, after reciting in effect that the then present income of the charity amounted to £1300 per annum, of which

* *Present:*—Lord Selborne, Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, and Sir Robert P. Collier.

£700 per annum was applied for purposes of education, it was, among other things, proposed that the head master should no longer be required to be a clergyman of the Church of *England*, or in priest's orders, or an university scholar of the degree of master of arts, but should be a graduate of an university, and should no longer be liable to any duties or services in the chapel at *Haydon Bridge*, and that the schools at *Haydon Bridge* should be open to all, wheresoever resident or born. It also provided that "it having been the intention of the founder that school fees should be taken, and the trustees being convinced, from the general experience of other schools in the district and vicinity, that the nonpayment of fees for attendance, as at present at the schools at *Haydon Bridge*, has a tendency to increase the laxity of attendance on the part of the boys and girls at these schools, and of their not sufficiently appreciating, as well as their parents, the advantages of education, whereas the attendance at the other schools in the vicinity is generally better and more regular where moderate fees are taken for teaching," the trustees should be empowered to charge fees for boys and girls attending the schools, and that the head master should also be allowed to charge fees in certain cases, and that the parents or guardians of children might claim for them exemption from religious worship or lessons.

The following was the petition of appeal against the said scheme presented by certain inhabitants and ratepayers of the Chapelry of *Haydon* and *Woodshields*:—

"The humble petition of the undersigned sheweth that the administration of the foundation of the schools at *Haydon Bridge* called the *Shaftoe's Charity* is, by deed dated 1685 and by two Acts of Parliament dated respectively 1785 and 1819, amply provided for by the provision therein contained for regulating the management of the said charity and for the disposal of any surplus income arising from the property of the said charity, so as to secure the full benefits and advantages of such charity to the class of persons named in such deed aforesaid, and submit that the present scheme of 1876 is unnecessary and against the wishes of the undersigned inhabitants and ratepayers of the chapelry of *Haydon* and *Woodshields*. Your petitioners further say, that the aforesaid scheme directly and injuriously affects them as inhabitants and

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ratepayers of the above-mentioned chapelry by depriving them of having their children taught free of all expense as heretofore, and they feel aggrieved by the scheme on the ground that it takes away and abolishes the right that they have had of having their children so educated pursuant to the intention of the founder's deed of 1685. They also complain that the scheme does not make any due compensation for their vested interest, being the free education of all the children born and resident in the chapelry of *Haydon* and *Woodshields* for ever.

"Your petitioners would humbly urge another very important objection to the scheme, viz., it makes no provision whatever for the outlying districts of the chapelry, which extends about five miles north and south from *Haydon Bridge*. Some years ago two school houses were built in these districts by subscription, and the schools are maintained partly by private efforts and by annual donations from the trustees of *Shaftoe's Charity* in consideration of the children who attend them belonging to the chapelry of *Haydon*. We consider this a very grave oversight, especially when the wild and boisterous winters of these districts are taken into account.

"For these and other considerations your petitioners humbly pray that your Majesty will withhold her consent from such scheme, particularly that part (paragraph 16) which proposes to enforce a tuition fee. Seeing that the great majority of the petitioners and inhabitants are miners and agricultural labourers, and people that are unable and unwilling to pay, inasmuch as the means for the elementary, commercial, and classical education of all the children of the chapelry of *Haydon* and *Woodshields* has already been provided for, the income at present being above £1000 per annum.

"We have asked the Commissioners to send down a representative to make inquiries on the spot, and the Council of Education to do us justice, but they have not listened to our request. We have objected to their scheme because it confiscates our rights and those of our children after us, and is contrary to the object and intentions of the deed of foundation, being that the children in the chapelry of *Haydon* and *Woodshields* were to be educated at a nominal fee (not to exceed 6*d.* per quarter), which by the Act of

1785 was abolished and the school made free for ever. We would also further suggest that the large sum of money (£3500) which has accumulated in the hands of the trustees for the rebuilding of the present school-houses (which are in a very dilapidated state, as is also the playground surrounding them) be at once applied to such purpose, and to erect buildings suitable to the requirements of the district, and not to the building of a middle class or rival school (the entrance and tuition fees to such school as proposed by the schemes of the Commissioners would be entirely out of the reach of the great majority of the inhabitants, and the school would also be barred against a very important portion of our children, viz., girls). We consider that the whole affair would be a bone of contention and a setting of class against class, and a misapplication of the trust, and contrary to the intents and purposes of the donor's deed of foundation and subsequent Acts of Parliament. For these and other pleas that might be urged, we again humbly ask your Gracious Majesty to withhold your name and seal from this scheme of 1876, and your petitioners, as in duty bound, will ever pray."

Mr. *H. Tindal Atkinson*, for the Appellants.

Mr. *Davey*, Q.C., and Mr. *Romer*, for the Respondents.

A preliminary objection was taken to the hearing of the appeal, on the ground that the Petitioners were not persons directly affected by the scheme within the meaning of the *Endowed Schools Act*, 1869, sect. 13, or persons to whom a right of appeal to the Queen in Council had been otherwise given.

The judgment of their Lordships was delivered by

LORD SELBORNE:—

Their Lordships are of opinion that the preliminary objection taken to the hearing of this petition must prevail. By the 39th section of the *Endowed Schools Act* of 1869 the right of appeal against schemes settled by the Commissioners is defined and rather strictly limited. Of course it must be taken for granted that Parliament had good reason for those limitations; at all events it is not open to any tribunal to review those reasons or to

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consider whether they were expedient or otherwise. The provision of the section is that on certain specified grounds, of which there are four, there may be an appeal by petition to Her Majesty in Council against the scheme:—as to three of the grounds, by the governing body of the endowment or by any person or body corporate directly affected by the scheme, or, on the fourth ground, by the governing body alone. Whoever appeals under that clause is required to state in the petition to her Majesty in Council the grounds of the petition; and their Lordships take that to mean that he must shew on the face of the petition that he appeals on one of the grounds expressly recognised by the clause, and is a person directly affected by that of which he complains.

Now these Petitioners describe themselves in the course of their petition as "the undersigned inhabitants and ratepayers of the chapelry of *Haydon* and *Woodshields*;" and the only ground which they allege for their objection to the scheme, repeated indeed in various forms of expression several times over, is that by the founder's deed they have a right, and that all inhabitants and ratepayers of the chapelry in common with them have a right, to have their children taught free of expense in the school; and that this right will be taken away, or subjected to charges of which they complain, by the scheme. It was said at the Bar that there might be other objections connected with a branch of the charity not educational, but their Lordships find in the petition no such ground alleged. There is no reference on the face of the petition to any objection whatever, except the loss of privileges in respect of education given to the inhabitants of this place by the founder's deed, and given to them evidently as a class. No individual complains that he has a child at the school whose *status* will be interfered with. Manifestly they come here as representing the class of inhabitants and ratepayers, and the general interest of that class in the benefit of this place of education under the founder's will. Their Lordships are of opinion, and would be of opinion even if there were no previous authority, that this is not an interest within the category of "vested interests" saved or required to be saved by the Act, and therefore that in respect of any vested interests these Petitioners are certainly not directly affected by this scheme. The class of vested interests to be pro-

vided for is expressly defined by the 13th section of the Act, and so far as relates to any matter connected with this complaint it is defined in a manner which excludes the subject of the complaint; being only "the interest of any boy or girl" (which their Lordships take to include the interest of the parent), "who was at the time of the passing of this Act on the foundation of any endowed school." The case clearly, therefore, is not one falling under the 2nd sub-section of clause 39, in which there ought to be a saving of a vested interest or compensation for taking it away. Under which, then, of the other sub-sections can it fall? Certainly not under the first, because the thing complained of is not a decision of the Commissioners in a matter in which an appeal to Her Majesty in Council is expressly given by the Act. Does it fall under the third, "of the scheme being one which is not within the scope of or made in conformity with the same?" Now their Lordships do not inquire, though they may be able perhaps to form an opinion, but they will not inquire whether the objections taken in this petition are of a nature which could have been brought within that division of the clause; but one thing is quite clear, that no one under the clause can complain upon that ground without shewing that he is directly affected by that of which he complains. These Petitioners, in the strict and natural sense of the word, are not "directly" interested; they have no present personal interests in this matter which are taken away; they have merely, as members of the class constituted by the inhabitants of a particular area, a general privilege or educational advantage; that is, the opportunity, if from time to time they or their children should require it, of sending their children for education, free of charge, to this school. But the loss of such opportunities, so far as they are interfered with by the scheme, affects not directly and immediately, but indirectly and contingently, each of these individuals. That point does not rest merely upon any judgment which their Lordships might now form, if the case were free from decision, as to the meaning of the word "directly" in the clause. Three cases were referred to. Their Lordships have not satisfied themselves, on referring to the records of those cases, that more than one of them is certainly in point; but one of them, unquestionably, is so. That is the case of *Harrow School*, which was

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determined on the 17th of June, 1874, at this Board, not, indeed, by the Judicial Committee, but by a special committee, which included among its members Lord *Hatherley* and Sir *Montague Smith*. The petition was by an inhabitant of *Harrow*, and it is at the present moment here; the objection to the scheme was, that the founder had, by his will, provided for the free admission and perpetual education and instruction of the children and youth of the parish of *Harrow*, and that the benefits given to the inhabitants of *Harrow* were practically taken away by the scheme. It was in substance the same objection that is made here; the only difference being, that the complaint was by one individual, and not by so many standing in the same situation as these Petitioners. No doubt it was not under the same Act of Parliament—it was under the *Public Schools Act* (31 & 32 Vict. c. 118); but that *Public Schools Act*, in the 9th section, provided, that it should be lawful for the trustees of any scholarship, exhibition, or emolument to which any statute made under the powers of the Act might relate, "or for any person or body corporate directly affected thereby," to petition Her Majesty in Council against such statute. The case, therefore, was exactly like the present, with this difference only, that in that Act there was not anything equivalent to sub-section 4 of this clause 39. Their Lordships will consider what difference that sub-section makes presently. This inhabitant of *Harrow* having petitioned that he, as an inhabitant of *Harrow*, was directly affected by statutes which took away the privileges of the inhabitants of *Harrow*, their Lordships made this minute of thieir decision after hearing the arguments: "The Lords of the Committee came to the conclusion that looking at the provisions of sect. 9 of the *Public Schools Act*, 1868, the Petitioner was not directly affected by the new statutes for the government of *Harrow School*, and agreed to advise Her Majesty that it was desirable that those statutes should be approved and confirmed by "Her Majesty." It does not appear that in point of form the objection was taken as a preliminary objection; it was treated as substantially a question upon the merits; and their Lordships expressly determined that the Petitioner had not an interest which was directly affected, and on that ground advised Her Majesty to confirm the statutes.

It appears to their Lordships that were it not for the more pre-

cise definition in this 39th section of the grounds on which a person directly affected may appeal, and were it not for the addition of the 4th sub-section, that would be an authority directly in point. What difference does the more precise definition and the 4th sub-section make? A difference not favourable, but unfavourable, to these Petitioners; because, while none of the other grounds are such as tend to shew that in the view of this Act of Parliament these Petitioners are directly affected, the 4th sub-section distinctly shews the reverse: because that precise class of interests, in respect of which these Petitioners complain under this scheme (that is to say, interests consisting in privileges or educational advantages to which a particular class of persons are entitled—and it may be observed that the 11th section expressly adds, "whether as inhabitants of a particular area or otherwise")—that particular class of interests is distinctly dealt with, as one which cannot be directly affected by the scheme, as to which therefore the right of appeal is given, not to "the governing body of any endowment to which a scheme relates, or any person or body corporate directly affected by such scheme," but to the governing body only. In this case, their Lordships do not know whether the governing body of the endowment has actively consented or not to the scheme; but certainly they have not appeared as Petitioners against it: and it would be going against the plain intent of the Legislature if, in the face of that limitation of the right of appeal for such a cause to the governing body alone, their Lordships were to entertain the present appeal on the petition of the inhabitants and ratepayers, as if they were directly affected by the scheme.

Their Lordships will therefore humbly report to Her Majesty their opinion that this petition ought to be dismissed, the Charity Commissioners not asking for costs.

Solicitor for the Appellants: *John Tucker.*

Solicitors for the Respondents: *Farrer, Ouvry, & Co.*

[PRIVY COUNCIL.]

J. C.* 1878 June 28.

ARCHIBALD HOOD (TRUSTEE OF THE ESTATE OF SALVATORE DECANDIA) . . . } APPELLANTS;

AND

STALLYBRASS, BALMER, & COMPANY, AND KANUNA FRÈRES . . . . . } RESPONDENTS.

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME CONSULAR COURT, CONSTANTINOPLE.

Commission Agent—Indemnity.

Quære, whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill drawn by the principal and accepted by such agent.

APPEAL from an order of the above-named Court (Nov. 7, 1876), confirming two orders (July 31, 1876, and Oct. 20, 1876) made by the said Court. The first of the last-mentioned orders restrained *Vincenzo Decandia* from parting with, selling, or dealing in any way with 450 tons of coals then lying in a store at *Courouchesme;* the second of the said orders directed *Vincenzo Decandia* to pay into Court all sums due to him, or to him as agent for *Salvatore Decandia*, of *Cardiff*, for and in respect of coals.

The facts of the case appear in the judgment of their Lordships.

Mr. *Benjamin*, Q.C., and Mr. *A. L. Smith*, for the Appellant.

Mr. *Milward*, Q.C., and Mr. *Biron*, for *Stallybrass, Balmer, & Co.*

Mr. *Butt*, Q.C., and Mr. *A. Wilson*, for *Kanuna Frères.*

The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This is an appeal by *Archibald Hood*, the trustee in the liquidation of the estate of *Salvatore Decandia.* It is against an order of

* *Present:*—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

the learned Judge of the Supreme Consular Court of *Constantinople*, dated the 7th of November, 1876, whereby he refused to set aside two former orders of the same Court, dated respectively the 31st of July, 1876, and the 20th of October, 1876, and confirmed those orders. The two latter orders were made in different suits, and although the applications for their discharge were by arrangement heard and disposed of together upon the same evidence, it will be convenient, their Lordships think, to consider the two cases, which are in some respects distinct, separately. The following facts which are common to both cases should first be stated.

Salvatore Decandia carried on business at *Cardiff* in this country, his principal if not only business being the consignment of coals to *Constantinople* to be sold there. The sales were effected by his brother *Vincenzo Decandia*, the character in which he made them being one of the matters more or less in dispute. On the 19th of July, 1876, *Salvatore Decandia* became insolvent and went into liquidation; on the 21st of July, 1876, that fact became known by telegraph to *Vincenzo Decandia* in *Constantinople*, who on the same day made and signed a declaration whereby he certified that all coals in his possession, and debts due to him for value of coals sold on credit, belonged to *S. Decandia*, of *Cardiff*; on the 27th of July, six days afterwards, *Vincenzo* received from the Appellant *Hood*, and one *Griffiths*, then acting as receivers under the liquidation, an order by telegram to stop all sales and deliveries except to one person, *Haidar Pasha*, who is said to have represented the government at *Constantinople*, and he telegraphed back on that day to Messrs. *Hood* and *Griffiths* that their instructions would be carried out. In his affidavit of the 2nd of August, 1876, which states these facts, he further says, "And accordingly I ordered the said coal store to be shut up and took the keys in my possession and left outside a trustworthy 'Bekey,' and since the 27th of July last past no coals whatever came out from the store." Now, if *Vincenzo Decandia* was, as the Appellant represents, and himself has sworn, a mere commission agent of his brother *Salvatore Decandia*, it is clear that upon the 27th of July that agency was determined; that, as Mr. *Benjamin* put it, he then attorned to the receivers under the liquidation; and that from that time, whatever he did in respect of the coals in his possession, he must be

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taken to have done as agent for them or for the Appellant who afterwards became sole trustee.

Their Lordships will now deal with the case of *Stallybrass, Balmer, & Co.* On the 31st of July that firm brought an action in the Consular Court of *Constantinople* against *Vincenzo Decandia*, as acceptor of a bill of exchange drawn by *Salvatore Decandia* at *Cardiff*, on the 13th of March, 1876, for £500, which was in these words: "Four months after date pay to my order the sum of five hundred pounds sterling, value received in coals, and advance p. *Eskdale*, S.S.," and was addressed to "*Vincenzo Decandia*, merchant, *Constantinople*." The acceptance is not stated on the face of the copy of this bill which is set out in the summons, but it is admitted to have been, like that of the bill which will be afterwards referred to, an acceptance made payable at the office of certain agents in *London*. The bill bore the blank indorsements of *Salvatore Decandia* and of *Stallybrass, Balmer, & Co.*, who had probably discounted it. The affidavit of the Plaintiff's agent, which was filed with the summons, stated that the Defendant had admitted his inability to pay; that he had in his store a quantity of coal amounting to at least 1800 tons, and that in order to secure the payment of the bill it was necessary to restrain him from parting with so much of the coal as would cover the amount of the bill with interest and costs, being the sum of £520. Accordingly upon the same day, the 31st of July, the Court made an order that, until the further order of the Court, the Defendant should be restrained from parting with, selling, or dealing in any way whatsoever with 450 tons of coal now lying in the store of the said Defendant at *Courouchesme*." That is the first of the orders which it was afterwards sought to discharge. An application seems to have been made in the first instance by *Vincenzo Decandia* to get it set aside, and for that purpose he on the 2nd of August made the affidavit the material parts of which have already been read. This was corroborated by the affidavit of one *John Vaffiades*, his clerk, which was also directed to shew that the coals in the coal depot were the property of *Salvatore Decandia*. A rule to shew cause why the order of the Court of the 31st of July, 1876, should not be set aside was thereupon granted, but no further proceedings took place upon it, and on the 15th of Decem-

ber, 1876, judgment was, with the consent of the Defendant, entered for the Plaintiffs for the sum of £500 sterling, with interest at the rate of six per cent. per annum, together with taxed costs of the suit. So far the proceedings were all between the holders of the bill and *Vincenzo Decandia* the acceptor. But on the 25th of September, 1876, an application was made on the part of Mr. *Hood*, the Appellant, to set aside the order of the 31st of July, 1876. It was supported by documents shewing what had taken place under the liquidation, and also by his own declaration that *Salvatore Decandia* was the owner and proprietor of the coals, and that he, as trustee in the liquidation, was the person entitled to receive that coal or to sell and dispose of it. This was one of the applications finally dismissed on the 7th of November, 1876, by the order under appeal.

The sole question between the Appellant and *Stallybrass, Balmer, & Co.*, as it seems to their Lordships, is, in whom was the property in the coal? If in the Appellants, the proceeds of that coal ought not to be applied in satisfaction of the judgment recovered against the acceptor, to the prejudice of the creditors and estate of the drawer of the bill. The direct evidence as to the ownership of the coal appears to their Lordships to be all one way. *Vincenzo Decandia* made further affidavits in addition to those already mentioned. He was also examined in the other suit *vivâ voce*, and his examination has by arrangement been allowed to be used as evidence upon the hearing of the application for the discharge of the order. The whole of that evidence, corroborated by the letters that are referred to in the affidavit of the 21st of October, 1876, go to establish the case that he was a mere agent selling on commission, though the terms of that commission were not very clearly defined; that he had no proprietary interest in the coal, which belonged in fact to *Salvatore Decandia* alone, and that before the action was brought he had agreed to hold the coal remaining in his hands on account of the trustees or receivers in liquidation.

It has, however, been argued at the Bar that the Judge might not unreasonably disbelieve all this evidence, and from the fact that the coal was found in the possession of *Vincenzo* in a store ostensibly belonging to him, and from the statement on the face

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of the bill to the effect that value had been received in coals and advance p. *Eskdale*, S.S., come to the conclusion that *Vincenzo* had such a legal interest in the coal as would make it properly applicable to the satisfaction of his judgment debt.

It appears, however, to their Lordships that no such inference can properly be drawn from the form of the bill; and that the mere fact of the possession of the coal is consistent with either theory as to its ownership. The bill may have been drawn as it was in order to give to *Vincenzo's* acceptance more credit than it deserved. But this circumstance cannot affect the question of property between the trustee in liquidation and the estate of the drawer, and the creditors of the acceptor. There was no hypothecation of the coal to meet the bill. Again, if the direct evidence given as to the character in which *Vincenzo* acted were untrue, it is difficult to see why it was not met by counter evidence. There must have been in such a case at *Constantinople* some means of shewing that he was in fact an independent merchant, and that he held the coal in a character other than that in which he was alleged to hold it. It therefore seems to their Lordships that the effect of the order of the 31st of July, 1876, was in fact to apply to the payment of *Vincenzo's* debt the property which ought to have gone to the trustee as property of *Salvatore Decandia*, to be applied in the due course of administration of his insolvent estate, and consequently that that order cannot be supported.

The other case was of this nature: A similar bill had been drawn on the 5th of May by *Salvatore Decandia*, at *Cardiff*, "Four months after date pay to my order four hundred eighty-two pounds sterling, value received in coals per *Fanny Mimbelli*." It was addressed to *V. Decandia*, merchant, *Constantinople*. It was accepted by him, payable at Messrs. *H. Clarkson & Co.*, 20, *Billiter Street, London*, was indorsed by *Salvatore Decandia*, and subsequently indorsed by Messrs. *Palmer, Hall, & Co.*, who are presumed to have discounted and to be the real holders of it. However that may be, they sent this bill to the Respondents, Messrs. *Kanuna Frères*, for realization at *Constantinople* from *Vincenzo Decandia*. Their suit was not commenced until the 18th of September, 1876. *Vincenzo Decandia*, when he was

applying for leave to defend the suit, put in an affidavit which, amongst other things, contained this statement: "I have been informed by *Aurelio Kanuna*, one of the said Plaintiffs, that the firm of *Kanuna Frères* has no interest whatever in the payment of the said bill, that all the interest therein belongs entirely to the firm *Palmer, Hall, & Co.* (signed in the second indorsement), for whom Messrs. *Kanuna Frères* are acting in this matter, as they generally act in all other matters, under a power of attorney. That the said *Salvatore Decandia*, of *Cardiff*, drawer of the said bill, instituted proceedings for liquidation under the *Bankruptcy Act*, 1869; and on or about the 22nd day of August, 1876, a resolution was carried out by which his creditors accepted a composition of 5*s.* per pound in full settlement of their claims. That amongst the other creditors there appeared and accepted the composition of 5*s.* per pound *Palmer, Hall, & Co.*, creditors, for the same and identical bill of exchange on which the said summons herein served upon me was taken out," and he objected to pay the sum indorsed. The Court gave him leave to defend the summons upon the terms of paying three fourths of the amount into Court. He was unable to comply with those terms, and the result was that judgment by default was entered up against him, and there is no appeal against that judgment.

The next proceeding against him was the issue of a judgment summons, which called upon him to state what means he had of paying. On examination he said, "I have no means to pay. I accepted this bill. I did not accept them against coals. I accepted them because I thought my brother was rich and a shipowner and could pay. I was foolish enough to sign this bill and others. I accepted them as accommodation for my brother. At my father's request by letter, I can find I can shew letters by which my brother said he would pay, as really he had paid, other bills in *London*. I have often accepted similar bills. I never bought bills of my brother. My brother sent me coals, a large quantity. I was the agent of my brother at the date when this bill was drawn. I had coals in my possession sent by my brother. Had 3000 tons, worth £5000. It was not intended that the bills should be paid by proceeds of coal. The coals I had at that

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time sold by me and remitted, of 1500 tons, £2500 about. Since the 18th September coals have been sold, all except 480 tons." Then he refers to the sequestration of the 31st of July.

In his affidavit in the other suit, sworn on the 2nd of August, 1876, he had said: "The quantity of coals existing in the said depôt is of about 1741 (tons), and all the said quantity belongs in full and exclusive property to the firm *S. Decandia* of *Cardiff*." And he added: "Since the 27th of July last past, no coals whatever came out from the store." If then at the date of this examination he had sold all except 480 tons, he must have sold a very considerable quantity of coals—1261 tons, under orders from the trustee, or, at all events, after he had attorned to the trustee and had changed the character of his agency. The result of his examination was that the Court made an order, being the second of those complained of, in these terms: "That all sums owing by all companies, firms, or individuals, to the said Defendant, or to him as agent for *S. Decandia*, of *Cardiff*, or his estate, for or in respect of coals, be paid by the said Defendant into this Court to answer in the first place the judgment of the Plaintiffs hereinunder and subject to the further order of this Court."

In so far as this order as to the proceeds of coals sold is sought to be maintained on the ground that the coals were the property of *Vincenzo*, that question has been disposed of by what their Lordships have said in the former case.

It has, however, been argued that this order, so far as it relates to sums due to *Vincenzo*, "as agent for *S. Decandia*, of *Cardiff*, or his estate, for or in respect of coals, was proper in the circumstances, and capable of being supported." Their Lordships admit that there is considerable force in the arguments which have been addressed to them by Mr. *Wilson* on this point. His contention, as their Lordships understand it, was to the effect that if *Vincenzo* were a mere agent on commission, he was entitled to be indemnified out of the proceeds of the coal sold by him against all liabilities incurred by him on account of his principal; that his acceptance being, as the Appellant alleges, a mere accommodation acceptance, was a liability of that character, and that his creditors had the right of standing in his shoes in that respect. In support of

this contention the cases of *Armstrong* v. *Stokes* (1), *Elbinger Actien-Gesellschafft* v. *Claye* (2), *Hutton* v. *Bulloch* (3), and *Drinkwater* v. *Goodwin* (4), were cited. It appears, however, to their Lordships, that the order in any case is considerably too wide, because it covers the proceeds of coals which were sold after the 27th of July, 1876, when *Vincenzo*, in selling any coals, was acting as the agent, not of *Salvatore Decandia*, but of the trustee for his creditors; and that in no point of view could it be proper to apply the proceeds of such coals in satisfaction of the judgment recovered by *Kanuna Frères*. The order, it may be further observed, is one which does not attach the proceeds in the hands of the vendees, it applies only to the proceeds of the coals after they had been received by the Defendant himself, when his rights against his principal would depend on the result of the account to be taken between them.

Looking to the wide form of the order, their Lordships are of opinion that when the application was made to the Judge of the Consular Court to discharge it he ought to have done so, or, at all events, to have varied it, and therefore that on this appeal and on this record the Appellant is entitled to succeed in respect of that order also. In so ruling, their Lordships do not wish to prejudice any question which might fairly have arisen in respect of any right which upon the authority of the cases cited by Mr. *Wilson*, Messrs. *Palmer, Hall, & Co.*, or Messrs. *Kanuna Frères*, might have had upon a state of facts properly established to stand in the place of the agent in respect of the proceeds of coals sold before the 27th of July, 1876. They do not, however, feel in a position to make any declaration or to come to any decision on that question, because it does not appear ever to have been fairly raised or considered in the Court below. Moreover it is a point worthy of consideration, whether such a right, if it ever existed, may not have been lost by what has taken place under the insolvency of *Salvatore* and the alleged acceptance by *Palmer, Hall, & Co.* of the composition from the trustee in liquidation. The acceptance of such a composition, if properly pleaded and proved,

(1) Law Rep. 7 Q. B. 598.
(2) Law Rep. 8 Q. B. 313.
(3) Law Rep. 8 Q. B. 331.
(4) 1 Cowp. 250.

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might have been a good defence to the action against *Vincenzo*, by extinguishing his liability as an accommodation acceptor.

Their Lordships, therefore, dealing with this case as it stands upon the record, which is unfortunately very scanty, must humbly advise Her Majesty to allow the appeal, to reverse the order of the 7th of November, 1876, and in lieu thereof to order that the orders of the 31st of July and 20th of October be set aside, and that the Appellant do have his costs of the applications to discharge those orders from the Respondents. If any costs have been paid by the Appellant to the Respondents or either of them, under the orders of the Consular Courts, which are now to be reversed and discharged, they must be paid back to him. He will also be entitled to his costs of this appeal, which the Respondents will be liable to pay in equal moieties. The money deposited by him to abide the event of the appeal will be returned.

Solicitors for the Appellant: *Willoughby & Cox.*

Solicitor for the Respondents *Stallybrass & Co.*: *T. Russel Kent.*

Solicitors for the Respondents *Kanuna Frères*: *Rogers, Jull, & Rogers.*

[PRIVY COUNCIL.]

HER MAJESTY THE QUEEN . . . . . APPELLANT;

AND

BURAH . . . . . RESPONDENT.

J. C.*
1878
May 15;
June 5.

ON APPEAL FROM THE HIGH COURT AT BENGAL.

Powers of Legislature—Indian Councils' Act, 1861, s. 22—*Indian High Courts Act*, 1861—*Conditional Legislation—Act XXII. of* 1869.

Act No. XXII. of 1869 of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the *Indian High Courts Act* (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council.

The 9th section of that Act, which confers upon the Lieutenant-Governor of *Bengal* the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power.

Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend.

APPEAL from a judgment of a full bench of the High Court (March 26, 1877).

The Respondent *Burah* and one *Book Singh*, since deceased, were tried by the Deputy-Commissioner of the *Khasi* and *Jaintia Hills*, in the *East Indies*, on a charge of murder of one *Kana Lalung*, committed near *Yeothymmai*, in the territory known and defined as the *Jaintia* and *Khasi Hills*, and sentenced to the punishment of death, but the sentence was afterwards, on the 23rd of April, 1876, commuted by the Chief Commissioner of *Assam* to transportation for life.

On the 9th of July, 1876, the officer in charge of the *Kamroop Jail*, where the said *Burah* and *Book Singh* were in confinement as prisoners under the said last-mentioned sentence, forwarded to

* *Present:*—LORD SELBORNE, SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

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the High Court at *Calcutta* petitions of appeal from them, dated the 9th of July, 1876, against the sentence.

The High Court having doubts whether they had jurisdiction over the prisoners referred the question of their power to entertain the petitions to a Full Bench of the said Court.

The question was argued before a Full Bench on two occasions, and the majority of the High Court, on the 26th of March, 1877, decided that the said Court had such jurisdiction, and that the record of the case ought to be sent for in order to the admission of the appeal, and the said Court passed judgment and ordered the same accordingly.

By Act XXII. of 1869 of the Council of the Governor-General of *India* in Council for making laws and regulations, which is entitled "An Act to remove the *Garo Hills* from the jurisdiction of the tribunals established under the General Regulations and Acts, and for other purposes," it is, among other things, provided as follows:—

Sect. 2. "This Act shall come into operation on such day as the Lieutenant-Governor of *Bengal* shall by notification in the *Calcutta Gazette* direct.

Sect. 3. "On and after such day, Act No. VI. of 1835 (so far as it relates to the *Khasi Hills*, therein termed '*Cossyah*' *Hills*), and the *Bengal* Regulation X. of 1822, shall be repealed: Provided that such repeal shall not affect any settlement of land, revenue, or other matters made under the latter enactment with zemindars or other persons in any place to which this Act applies.

Sect. 4. "Save as hereinafter provided, the territory known as the *Garo Hills*, bounded on the north and west by the district of *Gawalpara*, on the south by the district of *Mymensingh*, as defined by the Revenue Survey, and on the east by the *Khasi Hills*, is hereby removed from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue constituted by the Regulations of the *Bengal* Code and the Acts passed by any Legislature now or heretofore established in *British India*, as well as from the law prescribed for the said Courts and offices by the Regulations and Acts aforesaid. And no Act hereafter passed by the Council of the Governor-General for making laws

and regulations shall be deemed to extend to any part of the said territory, unless the same be specially named therein.

Sect. 5. "The administration of civil and criminal justice, and the superintendence of the settlement and realization of the public revenue, and of all matters relating to rent, within the said territory, are hereby vested in such officers as the said Lieutenant-Governor may, for the purpose of tribunals of first instance or of reference and appeal, from time to time appoint. The officers so appointed shall, in the matter of the administration and superintendence aforesaid, be subject to the direction and control of the said Lieutenant-Governor, and be guided by such instructions as he may from time to time issue.

Sect. 8. "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend to the said territory any law, or any portion of any law, now in force in the other territories subject to his Government, or which may hereafter be enacted by the Council of the Governor-General, or of the said Lieutenant-Governor, for making laws and regulations, and may on making such extension direct by whom any powers or duties incident to the provisions so extended shall be exercised or performed, and make any order which he shall deem requisite for carrying such provisions into operation.

Sect. 9. "The said Lieutenant-Governor may from time to time, by notification in the *Calcutta Gazette*, extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the *Jaintia Hills*, the *Naga Hills*, and to such portion of the *Khasi Hills* as for the time being forms part of *British India*.

"Every such notification shall specify the boundaries of the territories to which it applies."

Under the provisions of the said Act, No. XXII. of 1869, the Lieutenant-Governor of *Bengal*, on the 14th of October, 1871, issued a notification, which was published in the *Calcutta Gazette*, and thereby in exercise of the powers conferred upon him by sect. 9, he extended the provisions of the said Act to the territory known as the *Khasi* and *Jaintia Hills*, and excluded therefrom the jurisdiction of the Courts of Civil and Criminal Judicature, and specified in the notification the bounda-

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ries of the said territory. The following is a copy of the notification:—

Notification.

"The 14th of October, 1871, under sect. 9 of Act XXII. of 1869, the Lieutenant-Governor is pleased to extend all the provisions of that Act to the district of the *Khasi* and *Jaintia Hills*, bounded as follows:—

"By the districts of *Kamroop* and *Nowgong* on the north.

"The districts of *Naga Hills* and *Cachar* on the east.

"The *Gáro Hills* on the west.

"The districts of *Sylhet* and *Cachar* on the south.

"The chief political and revenue control of the aforesaid district, and the administration of civil and criminal justice, are vested in the Commissioner of *Assam*, subject to the general direction and control of the Lieutenant-Governor.

"The Commissioner will exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the said district, provided that no sentence of death shall be carried out without the sanction of the Lieutenant-Governor, and that it shall be competent to the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him may seem fit.

"The Deputy Commissioner of the district, and his assistants the native chiefs and officers, and the subordinate officers of Government, will exercise the same powers as they have hitherto exercised, until otherwise directed. No case not now triable in the ordinary British Courts shall by this notification be made triable therein. In respect of cases hitherto triable in those Courts, the officers shall be guided by the spirit of the laws prevailing in *British India* and heretofore in force in the district.

"(Signed) *S. C. Bayley*,
"Officiating Secretary to
the Government of *Bengal*."

The said High Court, for reasons assigned in separate judgments of Mr. Justice *Markby* and three other Judges, forming the majority of the said Court (*Garth*, C.J., *Macpherson* and *Pontifex*, JJ., dissenting), decided (March 26, 1877) that the notification of the

Lieutenant-Governor of *Bengal* had no legal force or effect in removing the said territory from the jurisdiction which the High Court had previously possessed over it, inasmuch as the Council of the Governor-General of *India* in Council for making laws and regulations had under its constitution, by the *Councils Act*, 1861, no power to delegate such authority to the Lieutenant-Governor as it had by the Act XXII. of 1869 in fact purported to delegate. Accordingly they decided that the High Court had jurisdiction to entertain the defence of the before-mentioned prisoners, notwithstanding the provisions of Act XXII. of 1869. Thereafter, on the 10th of October, 1877, the petitions of appeal came on for hearing before a Division Bench of the High Court, and on such hearing were dismissed.

The Government of *India*, on behalf of the Crown, being dissatisfied with the judgment and order of the Full Bench, dated March 26, 1877, a petition was presented to Her Majesty in Council by the officiating Advocate-General of *Bengal* praying for special leave to appeal therefrom to Her Majesty in Council; and on the 11th of July, 1877, such special leave was granted.

By the statute 24 & 25 Vict. c. 67 (the *Indian Councils Act*, 1861), the power given to the Governor-General in Council at meetings for the purpose of making laws and regulations is conferred by the 22nd section, which is as follows:—

Sect. 22. "The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of *India* within the dominions of princes and states in alliance with Her Majesty; and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of *Fort St. George*

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and *Bombay*, respectively, in Council, or the Governor or Lieutenant-Governor in Council of any presidency or other territory for which a council may be appointed, with power to make laws and regulations, under and by virtue of this Act: provided always, that the said Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of this Act:

Or any of the provisions of the Acts of the 3rd and 4th years of King *William* the Fourth, chapter 85, and of the 16th and 17th years of Her Majesty, chapter 95, and of the 17th and 18th years of Her Majesty, chapter 77, which, after the passing of this Act, shall remain in force:

Or any provisions of the Act of the 21st and 22nd years of Her Majesty, chapter 106, entitled "An Act for the better government of *India*," or of the Act of the 22nd and 23rd years of Her Majesty, chapter 41, to amend the same:

Or of any Act enabling the Secretary of State in Council to raise money in the *United Kingdom* for the Government of *India*:

Or of the Acts for punishing mutiny and desertion in Her Majesty's Army, or in Her Majesty's Indian Forces respectively, but subject to the provisions contained in the Act of the 3rd and 4th years of King *William* the Fourth, chapter 85, section 73, respecting the Indian Articles of War:

Or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof:

Or which may affect the authority of Parliament or the constitution and rights of the *East India* Company, or any part of the unwritten laws or Constitution of the United Kingdom of *Great Britain* and *Ireland* whereon may depend in any degree the allegiance of any person to the Crown of the *United Kingdom*, or the sovereignty or dominion of the Crown over any part of the said territories."

Sir *James Stephen*, Q.C., and Mr. *Graham*, for the Appellant, said that the main question was whether sect. 9 of Act XXII. of 1869

was within the legislative capacity of the Council; for, assuming the validity of that section, no objection had been raised to the notification. The three questions raised by the judgments of the Court below were, first, whether the Legislature had the power to remove the district in question from the jurisdiction of the High Court; second, whether it had the power to do so in the manner prescribed by Act XXII. of 1869, sect. 9; third, whether it is *ultrà vires* of the High Court to question the validity of an Indian Legislative Act.

As respects the first of these questions, it was pointed out that all the Judges were in favour of the existence of such legislative authority; and as regards the third question, they disclaimed that contention, and conceded that the High Court had such power.

With regard to the existence of such legislative authority, reference was made to 3 & 4 Will. 4, c. 85, s. 43; 24 & 25 Vict. c. 67, s. 22; 24 & 25 Vict. c. 104, ss. 9, 11, 13; and to *The Queen* v. *Meares* (1). By sects. 9, 11, and 13 of c. 104, it was intended to preserve to the Governor-General in Council certain legislative powers which otherwise, by reason of the provision in sect. 22 of c. 67, the Governor-General in Council would not have had. The matters covered by those sections are matters relating to the High Court in respect of which the Governor-General in Council was intended to have legislative powers. See, too, *The Queen* v. *Reay* (2). Act XXII. of 1870 gave validity retrospectively to all the provincial Acts which were open to the objections there taken. It asserts the power of the Governor-General in Council to interfere with the charters of the High Court. Reference was also made to 34 & 35 Vict. c. 35, s. 3, reciting Act XXII. of 1870 of the Governor-General's Council; *Feda Hossein's Petition* (3). See also *High Courts Act, i.e.* c. 104, s. 17, which prolongs the power of issuing letters patent for three years, and clause 44 of the Letters Patent of 1865.

The next question was whether the Legislature had power to affect the jurisdiction of the High Court by the mode provided in sect. 9 of Act XXII. of 1869. The powers of the Indian Legisla-

(1) 14 R. & R. 106. (2) 7 Bomb. H. C. R. Cr. Ca. 77.
(3) Ind. L. R. 1 Calc. 431.

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ture are as great as those of the Canadian, and see 30 & 31 Vict. c. 3 (*Canada*), s. 91; which establishes the Parliament of *Canada*. Compare 3 & 4 Will. 4, c. 85, s. 45. [LORD SELBORNE:—Is it contended that the Legislature may not render its enactment dependent for its coming into operation on the act of the executive?] That is the main contention on the other side. The powers given to the Lieutenant-Governor are within the limits of the legislative authority to confer; see Act XXII. of 1869, sects. 5 and 8. For instances of conferred discretion, see Act XI. of 1857; Act XVI. of 1857; Act XXIII. of 1861, sect. 39; Act VIII. of 1859, sect. 385; Act XIV. of 1859, sect. 24. The Legislature frequently delegates authority to say when the Act is to come into force, within what limits it is to be applied, and to make rules and orders. For instances of delegation of authority by Parliament to the Governor-General, see 22 & 23 Vict. c. 27; 28 Vict. c. 15, sects 3 and 5; 28 Vict. c. 18; 33 Vict. c. 3; 24 & 25 Vict. c. 67, sects. 44, 46, and 47. It would be a serious thing to interfere with the exercise of such delegated authority as being *ultrà vires* the legislative authority to confer. It has been frequently exercised in the colonies as well as in *India*: see Act III. of 1865 (*Cape of Good Hope*), sect. 12.

Mr. *J. B. Norton* and Mr. *Raikes* (Mr. *Eardley Norton* with them), for the Respondent, said that the Judges of the High Court seemed to have been unanimously of opinion that the Indian Legislature could legally remove districts from the jurisdiction of the High Court, and also that it was open to the High Court to try the validity of a law made by the Indian Legislature. The real question upon which difference of opinion existed was whether the Indian Legislature, by the particular means it had adopted in this case, effectually and legally carried out the object it had in view. They contended that the jurisdiction of the High Court as established by Parliament, could not be wholly abolished by any authority in *India*. Reference was made to the *Indian Councils' Act*, 24 & 25 Vict. c. 67, sect. 22. It was never intended to grant such power as is now claimed. According to the true construction of the above section it is not granted, but it is by necessary implication excluded. Compare

that section with 3 & 4 Will. 4, c. 85, s. 43. There is a significant and intentional omission in sect. 22, which in other respects is *totidem verbis*. Under sect. 43 of the former Act the Governor-General could legislate for all Courts whether by charter or otherwise, and for their jurisdiction. In 1861 the *High Courts Act*, 24 & 25 Vict. c. 104, and the *Councils' Act*, c. 67, were passed within six days of each other to carry out one and the same scheme. Jurisdiction was provided for under c. 104, and power to legislate in reference to the High Court was expressly reserved to Parliament by sects. 9, 11, and 13 of c. 104. No argument therefore can be drawn from c. 67, in favour of such legislative authority residing in the Indian Legislative Councils under that Act. Sect. 18 deals with territorial jurisdiction, and that is repealed by 28 & 29 Vict. c. 15, s. 2.

Next, assuming that the Indian Legislature has the power which is claimed for it, it has not adopted the proper method. If the jurisdiction of the High Court can be abolished by that Legislature, it must be by an Act passed by the Governor-General in Council, in conformity with the powers conferred on him in that respect by the Imperial Parliament. No such Act could delegate any legislative authority or power enabling the Lieutenant-Governor of *Bengal*, if he so pleased, to abolish the jurisdiction of the High Court. No such power of delegation was given, either expressly or by necessary implication, from the terms of the *Indian Councils' Act*. The notification of the 14th of October, 1871, was a nullity and of no legal effect. Reference was made to *Doyle* v. *Falconer* (1); and for American authorities to *Barto* v. *Himrod* (2); *Parker* v. *Commonwealth* (3); *Thorne* v. *Cramer* (4); *Bradley* v. *Baxter* (5). Parliament has constituted the legal machinery for making laws, nominating qualified persons, and regulating the method, time, and place by and in which Acts are to be passed, and has jealously guarded the degree in which any departure from their provisions may be effected, whenever such departure is permitted. Reference was made to 3 & 4 Will. 4, c. 85, s. 43, repealed by 24 & 25 Vict. c. 67, s. 40; Ibid. s. 70; 16 & 17 Vict.

(1) Law Rep. 1 P. C. 328.
(2) 4 Selden, N. York Rep. 483.
(3) 6 Barr. (Pennsylvania Rep.) 507.
(4) 15 Barb. (N. York Rep.) 112.
(5) 15 Barb. 122.

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c. 95, s. 22; 17 & 18 Vict. c. 77, s. 3; 24 & 25 Vict. c. 67, ss. 10, 14, 21, 22, 23, 25; 33 Vict. c. 3.

Lastly, it was contended that the question of the legislative capacity of the Governor-General's Council to affect the jurisdiction of the High Court did not arise in this case, inasmuch as by the true construction of Act XXII. of 1869 the jurisdiction of that Court as to the *Garo Hills* was not excluded. The Council had not assumed to exercise the legislative authority contended for, and still less to delegate its exercise in reference to the *Khasi* and *Jaintia Hills*. The nature of this contention sufficiently appears in their Lordships' judgment.

Sir *James Stephen*, Q.C., replied.

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The judgment of their Lordships was delivered by

LORD SELBORNE:—

This appeal has been brought under the following circumstances:—

In the year 1869 the Indian Legislature passed an Act (No. XXII. of 1869), purporting, first, to remove a district called the *Garo Hills* from the jurisdiction of the Courts of Civil and Criminal Judicature, and from the control of the offices of revenue, constituted by the regulations of the *Bengal* Code and the Acts passed by any Legislature then or theretofore established in *British India*, and from the law prescribed for such Courts and offices by such Regulations and Acts; and, secondly, to vest the administration of civil and criminal justice, within the same territory, in such officers as the Lieutenant-Governor of *Bengal* might, for the purpose of tribunals of first instance, or of reference and appeal, from time to time appoint. This Act was to come into operation on such day as the Lieutenant-Governor of *Bengal* should, by notification in the *Calcutta Gazette*, direct. By the 9th section the Lieutenant-Governor was empowered "from time to time, by notification in the *Calcutta Gazette*," to "extend, *mutatis mutandis*, all or any of the provisions contained in the other sections to the *Jaintia Hills*, the *Naga Hills*, and such portion of the *Khasi Hills* as might, for the time being, form part of *British India*," being,

as their Lordships understand, a mountainous district, conterminous towards the east with the *Garo Hills.*

The Lieutenant-Governor of *Bengal,* by notification in the manner prescribed by this Act, fixed the time at which it should come into operation in the *Garo Hills;* and afterwards, by another notification published in the *Calcutta Gazette* on the 14th of October, 1871, he extended all its provisions to the district of the *Khasi* and *Jaintia Hills,* declaring the administration of civil and criminal justice within that district to be vested in the Commissioner of *Assam,* subject to the general direction and control of the Lieutenant-Governor; and adding, that the Commissioner should exercise the powers of the High Court in the civil and criminal cases triable in the Courts of the district; provided, that no sentence of death should be carried out without the sanction of the Lieutenant-Governor, and that it should be competent for the Lieutenant-Governor to call for the record of any criminal or civil case, and to pass thereon such orders as to him might seem fit; and that the Deputy Commissioner of the district, and his assistants, the native chiefs and officers, and the subordinate officers of Government, should exercise the same powers as they had hitherto exercised, until otherwise directed.

Under this Act, and these notifications, one *Burah* (the Respondent here) and another person, since deceased, were in the year 1876 tried by the Deputy Commissioner of the *Khasi* and *Jaintia Hills* upon a charge of murder committed within that hill territory. They were convicted and sentenced to death, but on the 23rd of April, 1876, the sentence was commuted by the Chief Commissioner of *Assam* to transportation for life. On the 9th of July, 1876, they presented a petition of appeal to the High Court at *Calcutta;* and a majority of the Judges of that Court (four against three) decided, after argument in Full Bench, that the case fell within their appellate jurisdiction; and they sent for the record of the proceedings with a view to an adjudication thereon. From that decision the present appeal has, by special leave, been brought.

The ground on which the majority of the High Court assumed jurisdiction was, that the 9th section of the Act of 1869, purporting to authorize the Lieutenant-Governor of *Bengal* to extend

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the Act of 1869 to the *Khasi* and *Jaintia Hills*, was in excess of the legislative powers of the Governor-General in Council.

In the argument before their Lordships, the jurisdiction of the High Court was sought to be supported, not on that ground only, but on two others also, viz. (1), that the Act of 1869 did not, according to its true construction, exclude the jurisdiction of the High Court as to the *Garo Hills*, and, therefore, could not do so as to the *Khasi* and *Jaintia Hills*, assuming them to have been brought within its operation; and (2), that the whole Act of 1869 (at least so far as it might affect the jurisdiction of the High Court), and not sect. 9 only, was void, and *ultrà vires* of the Indian Legislature. The latter of these arguments had been urged unsuccessfully before the High Court at *Calcutta;* but the former was not presented to that Court, and was first suggested, at the hearing before their Lordships, by the junior counsel for the Respondent.

Their Lordships will first deal with that argument.

It was founded on the proposition, that the 4th section of Act XXII. of 1869 purports to remove the *Garo Hills*, not from the jurisdiction of the High Court, established by Her Majesty's letters patent under the authority of Imperial Statutes, but only from that of the local Courts, constituted by the regulations of the *Bengal* or by Acts of the Indian Legislature; and, therefore, that even if the jurisdiction of those local Courts was effectually taken away, and others (constituted by the appointment of the Lieutenant-Governor of *Bengal*) substituted for them, the appellate jurisdiction of the High Court remained.

Assuming (but not deciding) that "the Courts of Civil and Criminal Judicature," mentioned in the 4th section of the Act of 1869, were only the Courts of original jurisdiction established under the Indian Regulations and Acts, their Lordships think that the supposed consequence does not follow. It may be possible that under the terms of the 8th and 9th sections of the *High Courts Act* (24 & 25 Vict. c. 104), together with the 27th and 28th sections of the Royal Letters Patent (28th December, 1865), under which the *Calcutta* High Court is constituted, appeals might have gone to that Court from criminal tribunals of first instance, established by the Lieutenant-Governor of *Bengal* in the *Garo*, or

the *Khasi* and *Jaintia Hills*, if Act XXII. of 1869 had made no other provision for such appeals. But the 5th section of that Act distinctly authorized the Lieutenant-Governor to appoint tribunals, not of first instance only, but also of "Reference and Appeal;" and, by the notification now in question, he has done so, giving the powers of the High Court to the Commissioner of *Assam*, with an ultimate controlling authority to himself. Unless, therefore, the whole Act of 1869, or the 9th section of that Act, was void, as being in excess of the legislative powers of the Governor-General in Council, the jurisdiction of the High Court has been excluded.

The next question is, whether the whole Act of 1869 is void? It is said to be so, because the jurisdiction of the High Court was established by the Act of the Imperial Parliament already referred to (24 & 25 Vict. c. 104), which passed in the same session with the *Indian Councils' Act;* and because, by sect. 22 of the *Indian Councils' Act* (24 & 25 Vict. c. 67), the power of the Governor-General in Council "to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force, or hereafter to be in force, in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of Justice whatever, and for all places or things whatever within the said territories," is qualified by certain conditions; one of which is, "that the Governor-General shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof." None of the other conditions expressed in the Act apply to this case.

The question, therefore, is, whether an exercise of the legislative power of the Governor-General in Council, purporting to exclude the jurisdiction of the High Court within these particular districts, is inconsistent with any of the provisions of 24 & 25 Vict. c. 104?

Now, it appears to their Lordships, from the express terms of the Act 24 & 25 Vict. c. 104, that (unless there should be anything to the contrary in the letters patent under which the High Court is established) the exercise of jurisdiction in any part of

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Her Majesty's Indian territories by the High Courts was meant to be subject to, and not to be exclusive of, the general legislative power of the Governor-General in Council, as to "all Courts of Justice whatever."

By the 1st section of that Act, Her Majesty was authorized, by letters patent, "to erect and establish a High Court of Judicature for the *Bengal* division of the Presidency of *Fort William*," and others at *Madras* and *Bombay*. The next six sections relate to the qualifications, tenure of office, and emoluments, &c., of the Judges of such Courts. The 8th section abolishes, from the date of their establishment, the previously existing Supreme and Sudder Courts in the several presidencies. The material provisions as to jurisdiction are contained in the 9th, 11th, and 12th sections. The 10th and 18th may be laid out of the case, because they were both repealed by a subsequent Act of 1865 (28 & 29 Vict. c. 15). But, as some argument was founded on the 18th, it may be fit here to observe, that, by that section, Her Majesty was empowered to make Orders in Council transferring any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts, "and generally to alter and determine the territorial limits of the said several Courts;" and that the same power was, in substance, conferred upon the Governor-General of *India* in Council (not in his legislative, but in his executive capacity) by the repealing Act of 1865.

The 9th section of 24 & 25 Vict. c. 104, expressly says, that each of the High Courts shall, within its own presidency, have such civil, criminal, and other jurisdiction "as Her Majesty may, by her letters patent, grant and direct;" and that, "save as by such letters patent may be otherwise directed, and subject and without prejudice to the legislative powers in relation to the matters aforesaid of the Governor-General of *India* in Council," the High Court in each presidency shall have all the jurisdiction of the former Supreme and Sudder Courts, abolished by sect. 8. The authority of the Indian Legislature over the jurisdiction of the High Courts (so far, at all events, as the exercise of that authority might be consistent with Her Majesty's letters patent) is here distinctly recognised.

The 11th section is similar in effect. It enacts that, after the

establishment of the High Courts, every provision in any Act of Parliament, Order in Council, Charter, or Act of the Legislature of *India*, which had been applicable to the Supreme Courts of *Bengal*, *Madras*, and *Bombay*, shall be applicable to the High Courts, as far as may be consistent with that Act itself, and the letters patent to be issued under it, "and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of *India* in Council." The 12th section contains nothing of importance to the present question.

The Act of 1865 (under which the *Calcutta* letters patent of the 28th of December, 1865, were actually issued) concludes with an express saving of "the power of the Governor-General in Council at meetings for the purpose of making laws and regulations."

Lastly, by the letters patent of the 28th of December, 1865 (clause 44), it is "ordained and declared that all the provisions of these our letters patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations."

So far, therefore, from being in contravention of any of the provisions of the statute 24 & 25 Vict. c. 104, or of the letters patent issued under that statute (as altered by the Act of 1865), their Lordships find that such an exercise of legislative authority by the Governor-General in Council as might remove any place or territory from the jurisdiction of the High Court at *Calcutta* is expressly contemplated and authorized both by those statutes and by the letters patent themselves. Their Lordships, under these circumstances, agree with the High Court, that Act No. XXII. of 1869 was, in its general scope, within the legislative power of the Governor-General in Council: and they are therefore brought to the consideration of the more limited question, whether, consistently with that view, the 9th section of that Act ought nevertheless to be held void and of no effect.

The ground of the decision to that effect of the majority of the Judges of the High Court was, that the 9th section was not legislation, but was a delegation of legislative power. In the leading judgment of Mr. Justice *Markby*, the principles of the doctrine of agency are relied on; and the Indian Legislature seems to be

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regarded as, in effect, an agent or delegate, acting under a mandate from the Imperial Parliament, which must in all cases be executed directly by itself.

Their Lordships cannot but observe that, if the principle thus suggested were correct, and justified the conclusion drawn from it, they would be unable to follow the distinction made by the majority of the Judges between the power conferred upon the Lieutenant-Governor of *Bengal* by the 2nd and that conferred on him by the 9th section. If, by the 9th section, it is left to the Lieutenant-Governor to determine whether the Act, or any part of it, shall be applied to a certain district, by the 2nd section it is also left to him to determine at what time that Act shall take effect as law anywhere. Legislation which does not directly fix the period for its own commencement, but leaves that to be done by an external authority, may with quite as much reason be called incomplete, as that which does not itself immediately determine the whole area to which it is to be applied, but leaves this to be done by the same external authority. If it is an act of legislation on the part of the external authority so trusted to enlarge the area within which a law actually in operation is to be applied, it would seem *à fortiori* to be an act of legislation to bring the law originally into operation by fixing the time for its commencement.

But their Lordships are of opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers

were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in *India*, and arm with general legislative authority, a new legislative power, not created or authorized by the *Councils' Act*. Nothing of that kind has, in their Lordships' opinion, been done or attempted in the present case. What has been done is this. The Governor-General in Council has determined, in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary Courts and offices, and to place it under new Courts and offices, to be appointed by and responsible to the Lieutenant-Governor of *Bengal;* leaving it to the Lieutenant-Governor to say at what time that change shall take place; and also enabling him, not to make what laws he pleases for that or any other district, but to apply by public notification to that district any law, or part of a law, which either already was, or from time to time might be, in force, by proper legislative authority, "in the other territories subject to his government." The Legislature determined that, so far, a certain change should take place; but that it was expedient to leave the time, and the manner, of carrying it into effect to the discretion of the Lieutenant-Governor; and also, that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also; but that, as it was not certain that all those laws, and every part of them, could with equal convenience be so applied, it was expedient, on that point also, to entrust a discretion to the Lieutenant-Governor. This having been done as to the *Garo Hills*, what was done as to the *Khasi* and *Jaintia Hills?* The Legislature decided that it was fit and proper that the adjoining district of the *Khasi* and *Jaintia Hills* should also be removed from the jurisdiction of

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the existing Courts, and brought under the same provisions with the *Garo Hills*, not necessarily and at all events, but if and when the Lieutenant-Governor should think it desirable to do so; and that it was also possible that it might be expedient that not all, but some only, of those provisions should be applied to that adjoining district. And accordingly the Legislature entrusted, for these purposes also, a discretionary power to the Lieutenant-Governor.

Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council. Their whole operation is, directly and immediately, under and by virtue of this Act (XXII. of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers; and the result of that judgment has been to legislate conditionally as to all these things. The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an imperial or in a provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing; and, in many circumstances, it may be highly convenient. The British Statute Book abounds with examples of it: and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in *India* are mentioned in the opinions of the Chief Justice of *Bengal*, and of the other two learned Judges who agreed with him in this case. Among them are the great Codes of Civil and of Criminal Procedure (Acts VIII. of 1859, XXIII. of 1861, and XXV. of 1861).

By section 385 of the Code of Civil Procedure, it is provided that "this Act shall not take effect in any part of the territories

not subject to the general regulations of *Bengal*, *Madras*, and *Bombay*, until the same shall be extended thereto by the Governor-General in Council" (not in his legislative capacity), "or by the Local Government to which such territory is subordinate, and notified in the *Gazette*." Section 445 in the Code of Criminal Procedure is precisely similar. And by sect. 39 of Act XXIII. of 1861, when any such extension as that authorized by section 385 of the Act of 1859 is made, it may, with the previous sanction of the Governor-General in Council (not in his legislative capacity), be declared to be "subject to any restriction, limitation, or proviso which the Local Government may think proper." If their Lordships were to adopt the view of the majority of the High Court, they would (unless distinctions were made on grounds beyond the competency of the judicial office) be casting doubt upon the validity of a long course of legislation, appropriate, as far as they can judge, to the peculiar circumstances of *India*; great part of which belongs to the period antecedent to the year 1861, and must therefore (as Sir *Richard Garth* well observed) be presumed to have been known to, and in the view of, the Imperial Parliament, when the *Councils' Act* of that year was passed. For such doubt their Lordships are unable to discover any foundation, either in the affirmative or in the negative words of that Act.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal in the present case should be allowed, and the judgment of the High Court reversed.

Solicitor for Appellant and Respondent: *The Solicitor, India Office.*

[PRIVY COUNCIL.]

J. C.* 1878 June 18, 19, 20; July 12.

HENRY BARLOW WEBB . . . . . PLAINTIFF;

AND

RICHARD W. H. GIDDY . . . . . DEFENDANT.

AND

RICHARD W. H. GIDDY . . . . . DEFENDANT;

AND

HENRY BARLOW WEBB . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT OF GRIQUALAND WEST, SOUTH AFRICA.

Construction of a Grant in Erfpacht, subject to Conditions—Full Ownership—Beneficial Ownership of Minerals in Land granted in perpetual Quit-rent.

8 App Cas 819 327

In an action against the Government for an account and payment of moneys in respect of licences to diggers for diamonds upon an estate of the Plaintiff, it appeared that the original grant of the estate in question was made by the *Orange State* on perpetual quit-rent (*voordurende erfpacht*), but subject to conditions imposed or to be imposed by the State; the *Orange State* Ordinance, No. 3, 1871, having thereafter imposed conditions, which were subsequently recognised by the Crown, under which the Plaintiff and the Government took each one-half of the licence moneys for defraying the expenses of superintending the digging:—

Held, that it was too late for the Crown without any evidence that its officers acted from mistake to impeach the Plaintiff's title to the minerals upon a presumption derived only from the form of the grant, to the effect that it created an *emphyteutic* tenure only.

By Roman-Dutch law a grant on perpetual quit-rent (*voordurende erfpacht*) is understood to be a grant in *emphyteusis*, and under it the grantee has the usufruct only, and not the right to minerals; but that law was declared to be the common law of the *Orange State* only "where no other law has been made by the Volksraad." Under the special terms of the grant itself, and having regard to Ordinance No. 3 of 1871 (which was a legislative declaration by the Volksraad of its effect), and to proclamations issued on behalf of Her Majesty, this grant, notwithstanding its form, had not and was not intended to have the limited operation of a grant in *emphyteusis*, but gave the full ownership of the land to the grantee.

APPEALS from a judgment of the High Court of *Griqualand West* (August 10, 1876), whereby it was ordered that the Respondent

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

Giddy, in his capacity as Civil Commissioner for the district of *Kimberley*, do render to the Appellant, as agent of the *London and South African Exploration Company, Limited*, an account in respect of licences to dig for diamonds and other rents and royalties as had been collected by the Government at the diggings at *Dorstfontein*, otherwise known as *Du Toit's Pan*, from the 17th of November, 1871, to the said 10th of August, 1876; that the said money, rents, and royalties were to be accounted for at the rate of 10*s.* 6*d.* per licence per month only, and not at any higher rate; that the company were not entitled to raise the rate for licences above 10*s.* 6*d.* per month; that the amount paid to the Government by diggers in respect of transfers of such licences should be deducted in the adjustment of the accounts between the parties, such transfer dues having been included in the amounts already paid by the Government to the Appellant in his said capacity in error; that the Respondent should render to the Appellant on or before the 10th of October, 1876, a correct statement of such sum as had been found necessary to defray the public expenditure in respect of the establishment necessary for the maintenance of order and good government at the *Du Toit's Pan Diamond Field*, since the 17th of November, 1871, up to the time of the said judgment; and that the Respondent in his said capacity should pay the costs of suit.

The facts of the case are fully set out in their Lordships' judgment.

The action was commenced on the 5th of November, 1875.

By his declaration the Appellant, as Plaintiff, prayed an account of all licence moneys, royalties, or rents fixed by the company or their lawful agent since the 17th of November, 1871, and an account of such sum, if any, as had been found necessary to be retained in order to defray the public expenditure in respect of the establishment necessary for the maintenance of order and good government at *Dorstfontein* since the 17th of November, 1871; that the said accounts might be debated and adjusted and the Respondent condemned to pay to the Appellant the balance of such licence moneys, royalties, or rents, the Appellant allowing all such sums of money as he had received from the Respondent since the 17th of November, 1871, up to the 1st of May, 1874, to be deducted

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from such amount as might be found to be due; and that the Defendant might be ordered thenceforth to render such account and pay over such balance monthly.

To this declaration the Respondent, as Defendant, pleaded first the general issue, and then fifteen special pleas, No. 2 to 16, inclusive. By the 2nd, 3rd, 4th, 5th, 6th, and 7th of such pleas the Respondent denied the title of the company to the farm of *Dorstfontein*. By the 8th he alleged that the Commissioners' Proclamation of the 17th of November, 1871 (for the terms of which the reader is referred to their Lordships' judgment), was never duly promulgated and had no validity. By the 9th and 12th, that the said farm was held on the tenure of perpetual quit-rent, and was thereby subject to a reservation of precious stones and minerals to the State as *dominus directus* of the soil, and that all rights formerly vested in the *Free State* Government were vested in Her Britannic Majesty. By the 10th, he alleged that the said proclamation of the 17th of November, 1871, contained a needless and incorrect allegation that the title of the said farm was not subject to any reservation of precious stones and minerals, and that the Crown was not bound or affected thereby. By the 11th he alleged that the company were not damnified. By the 13th and 14th he alleged that all payments to the company had been made in error. By the 15th, that sect. 29 of Proclamation No. 71, of 1871 (the terms of which are sufficiently set forth in their Lordships' judgment), did not apply to the farm, *Dorstfontein;* and by the 16th, that the expenditure in respect of the public establishment necessary for the maintenance of order and good government at *Dorstfontein* more than absorbed the licence moneys, royalties, and rents. And the Respondent, as Plaintiff in reconvention, prayed that the Appellant as Defendant in reconvention, might be condemned to render an account and repay to the Plaintiff all moneys so paid in error as aforesaid, together with interest and costs.

The Appellant joined issue upon the aforesaid pleas, and to the claim in reconvention pleaded the general issue, upon which plea the Respondent as Plaintiff in reconvention joined issue.

Previously to the hearing of the action, the title of the company to the farm *Dorstfontein* was confirmed by a judgment of the Land Court of *Griqualand West*, and the pleas denying the title of

the company to the farm *Dorstfontein* were for that reason not relied on by the Respondent at the hearing of this action.

Sir *Henry James*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *Cohen*, Q.C., and Mr. *Romer* with them), for the Appellant, contended that the judgment appealed from, so far as it condemned the Respondent to render an account of all licence moneys, rents, and royalties in respect of such licences as had been collected by the Government, and a correct statement of such sum as had been found necessary to defray the public expenditure in respect of the establishment necessary for the maintenance of order and good government at *Dorstfontein* was right, and ought to be affirmed. But they contended that in so far as it disallowed the claim of the company to increase the charge for licences, and limited the rate at which the moneys, rents, and royalties are to be accounted for to 10*s.* 6*d.* per licence per month, and orders the amount paid in respect of transfers of licences to be deducted, the judgment appealed from was wrong, and ought to be reversed. The company was entitled to the farm *Dorstfontein*, as *dominus directus* of the soil, and the farm was not subject to any reservation of precious stones and minerals. There was no identity between the position of the company as holders of their farm at a perpetual quit-rent, and that of the *emphyteuta* of the Roman law, who admittedly was not owner of the minerals under his land. The *emphyteuta* held his land under an obligation to improve the same. He could not cut timber, dig clay or gravel, or commit any kind of waste. He was liable upon non-payment of his rent for three years to have his land forfeited. If the State were "*dominus*," he was liable to other penalties in lieu of forfeiture. Abandonment of his land worked a forfeiture, and if he transferred it, the transferee took it subject to the *jus retractûs*, or right of the lord (*dominus emphyteuticarius*) to step into the place of the transferee within a year after the notice of transfer. Thus, in the case of *emphyteusis*, the *dominium plenum* remained in the grantor of the property, as *dominus directus* of the soil, while the *emphyteuta* had only the right of possession. On the evidence of expert witnesses who had been examined in the case, it was contended that none of these incidents to the holding of the *emphyteuta* appertained to

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the quit-rent tenure of the *Free State*. That tenure was not one of *emphyteusis* or even of the "*erfpacht*" of the Roman-Dutch law, but of "*voordurende erfpacht*," or perpetual quit-rent. In fact the use of the word "*erfpacht*" constituted the sole analogy between the *Free State* perpetual quit-rent tenure and the *emphyteusis* of the Civil Law. The quit-rent payable under the free state tenure (which was called *recognitie* as well as *erfpacht*) was paid to secure the protection of the State, or by way of tax, and not in recognition of the state as *dominus directus* of the soil. The quit-renter could cut down trees, dig gravel or clay, open quarries or coal-pits with impunity, was subject to no *jus retractûs*, was under no obligation to improve the property, and was not liable to forfeiture in the event of non-payment of quit-rent, payment whereof was enforced in practice by execution or by edictal citation.

No other form of land tenure was known in the *Free State*, and its legislation contains frequent references to "*eigenaars*" (owners) and "*eigendom*" (ownership), meaning thereby quit-renters and quit-rent tenure, while the term "*emphyteusis*" was not employed, and any such thing as an "*erfpachter*" or "*emphyteuta*" was unknown. Moreover, although it was alleged by the expert witnesses that there had been no actual decision in any *Free State* Court upon the subject of any reservation of minerals to the State, yet it appeared, by the evidence of the Appellant's expert witnesses, that the question had been raised in the Volksraad, and opinions expressed strongly against any such reservation, and that, as a matter of *Free State* law, no such reservation, in fact, existed. To this the Respondent's expert witness appeared to agree, and, according to the evidence of all the expert witnesses, the quit-renter of *Free State* law had the "*dominium plenum*" as "*dominus directus*" of the soil. It further appeared that, according to *Free State* law, any servitude on a farm, unless created by legal enactment, must appear on the title-deed, and that no servitude of any kind appeared in the titles to quit-rent farms issued by the State, including that issued to the company's predecessor in title. Further than that, the right of the company to precious stones and minerals on the farm had been recognised by the Legislature of the *Orange River Free State*, and confirmed by the existing law

of *Griqualand West*. The Government, also, had recognised such right. By law the Respondent was accountable as prayed, and the company was entitled, and had always been entitled by law, to fix the rate of licence money, rents, or royalties, and to charge fees in respect of transfers of licences.

Reference was made to *Orange State* Ordinance 3 of 1871, as a declaration by the State Legislature that the diamonds belonged to the proprietors of the farm; to the Commissioners' Proclamation of the 17th of November, 1871; to Sir *Henry Barkly's* Proclamations, Nos. 67, 68, 71, 72, and 73 of 1871; and to Proclamation No. 59, issued on the 7th of November, 1872.

The Attorney-General (Sir *J. Holker*), and Sir *James Stephen*, Q.C. (Mr. *Beaumont* with them), for the Respondent, contended that the Appellant company were not the owners of the farm *Dorstfontein* by a title freed from any reservation of precious stones or minerals. The original grant created and conferred on the grantee merely the right and interest known in the British colonies in *South Africa* (the laws of which have been based on the Roman-Dutch law) as a perpetual quit-rent tenure, which is identical with the *jus emphyteusis* or *erfpacht*, and is subject to conditions and reservations in law, amongst which is the reservation to the grantor of the right to precious stones. The *jus emphyteusis* of the Roman-Dutch law was not or did not carry an absolute title in fee simple, or *dominium plenum*. It gave an actual estate, or at least a *jus in re*, and may have conferred the *dominium utile*; but it was the recognised type of *jus in re alienâ*, the *dominium directum* remaining in the grantor. This tenure was in many respects analogous to that of customary estates known to English law, and as to some of its incidents seems to have been subject to local or customary variations; but amidst all such variations was governed by the essential and unquestioned principle that the rights of the tenant or *emphyteuta* were *in fructu* only, that he might not waste or depreciate the tenement held by him, and in particular that (except it may be for the purpose of building or improving the tenement) he had no right to the minerals.

Further, the grant of the 4th of April, 1860, was one not of the *dominium plenum*, but merely of the *jus emphyteusis*. Though they

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appear only in translation, the words "on perpetual quit-rent" sufficiently import a grant of a specific and definite and a qualified right. Moreover, it appeared from the evidence that *voordurende erfpacht* are the words in the original which have been so translated, and that *recognitie* is the word afterwards translated "quit-rent," those words being the precise and technical terms used by the Dutch authorities as equivalent to the "*emphyteusis*" and "*pensio*" (or "canon") of the Latinists. Reference was made to the forms of assurance in use in the *Cape Colony* and their established construction. The form of grant "in perpetual quit-rent" as there used was in evidence, and in all essential particulars the same as the translated grant of *Dorstfontein*. The effect of a Crown grant "in perpetual quit-rent," with reference to the reservation under it of minerals to the Crown, came under consideration in the case of *De Villiers* v. *Divisional Council of Cape Town*, which is referred to in the judgment of the learned Judge in the Court below, as having been then lately decided by the Supreme Court of the *Cape of Good Hope*. That decision was, however, brought on appeal before their Lordships of the Judicial Committee of the Privy Council (1), and was reversed upon the express ground that the grant "in perpetual quit-rent" was, according to the law of the *Cape of Good Hope*, a grant merely of the *jus emphyteusis*, and as such implied a reservation of minerals.

Reference was made to *Van Leeuween*, *Censura Forensis*, vol. i. lib. ii. c. 16, s. 1; Encyclopædia Britannica, tit. "*Cape of Good Hope*"; for the history of the introduction of this tenure into the Colony, to *Clarke's* Colonial Law, p. 467, tit. "*Cape of Good Hope*," note; Acts 2 of 1860, 19 of 1864, 5 of 1870. For the first mention of *emphyteusis*, see Institutes, book III. tit. 24; Code, book IV. tit. 66, sect. 2. The essence of the tenure was that the holder of the land held it at a perpetual quit-rent. See also *Voet*, lib. vi. tit. 3, sect 11. "*Non tamen emphyteutæ licitum effodere ex agro emphyteuticario terram fictilem figulinæ exercendæ causâ, aut terram combustilem, longeque minus metallifodinas aut lapicidinas lapidum haud renascentium instituere vel exercere. Quamvis enim hæc fructuario concessa sint in quantum pretio rutorum cæsorumque utitur fructuarius quodam quasi ususfructus*

(1) 2 App. Cas. 567.

jure, sed cum onere et sub cautione de eo restituendo post ususfructus finem. Tamen ad emphyteutam id extendendum non est; quippe qui vel sub lege meliorationis rem in emphyteusin accipit, vel saltem eam secundum mores hodiernos deteriorem efficere nequit; deteriorem vero redderet, pretiique minoris per metallorum et terræ fictilis similiumque eductionem." See also *Grotius's* Introduction to Dutch Jurisprudence (translated 1845 by *Charles Herbert*), pp. 224, 351; *Ulrici Huberi Prælectiones*, c. II. 276; *Greenwegen's Tractatus de Legibus*, tit. 66, *De Jure Emphyteutico*; *Smith's* Dict. Antiquities, tit. *Vectigal*; Code, book XI. tit. 6; Digest, book 50, tit. 16, sect. 17.

Reference was also made to Sir *John Cradock's* Proclamation of 1813 (August 6), which has the force of law in the *Cape of Good Hope*, and was adopted therefrom by the *Orange Free State*. It defines and regulates the extent and incidents of the reservations out of a quit-rent tenure. See *Divisional Council of Cape Town* v. *De Villiers* (1), where its provisions were treated as applicable to all grants "in perpetual quit-rent." Amongst the rights and interests there defined as being reserved to the Crown upon such grants, are "mines of precious stones." With regard to the evidence of expert witnesses, that is not admissible as to the law of real property in the *Orange Free State*, which is in effect and as to *Dorstfontein* not a foreign law, but part of the substantive law of *Griqualand West*. So far as such evidence relates to usage, no usage has been, or in the nature of the case could be, established as prevailing in that state with respect to the matters in question, except such usages of the *Cape Colony* as are applicable to its condition.

Although the judgment of the Court below was right as to its view of the Appellant's title, it held that after the Commissioner's Proclamation of the 17th of November, 1871, the Appellant acquired by virtue of Ordinance No. 3 of 1871 an interest in the diamonds in question, and therefore that the Respondent was liable to account to him under sect. 29 of the Proclamation No. 71 of 1871. That contention, however, was not raised by the pleadings. It was submitted that the Ordinance could not nullify the actual reservation of precious stones out of the Appellant's

(1) 2 App. Cas. 567.

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grant. It had no bearing on the case, being merely an administrative measure adopted in an emergency. Its operation was superseded by the annexation of the territory in question to this realm, and by the Proclamation of Sir *H. Barkly* (No. 71 of 1871). Further, the Commissioners' Proclamation of the 17th of November, 1871, was not duly made or promulgated, and was null and of no effect under No. 71 of 1871, s. 29. No doubt the Commissioner's proclamation recites that the land in question was not subject to any reservation of precious stones or minerals. Such erroneous recital could not alter the actual state of the case, and the Commissioners have no authority to prejudice the rights either of the Crown or the company. Moreover, the proclamation itself being issued by two out of the three Commissioners, who were empowered to act in that behalf, was invalid. It did not define in any words consistent with the law the area of the diamond field which it assumed to proclaim. See its terms, and Proclamations Nos. 67 and 73 of 1871, under which it was expressed to be made: see *Reg.* v. *Burah* (1). With regard to the Respondents' claim "in reconvention" to be repaid sums paid by him to the Appellant under the erroneous belief that the Appellant was absolute owner of *Dorstfontein;* the money was paid under a mistake of fact and not of law: see *Cooper* v. *Phibbs* (2).

Mr. *Benjamin,* Q.C., replied.

1878 July 12.

The judgment of their Lordships was delivered by

SIR ROBERT P. COLLIER:—

The action which gives rise to these cross appeals was brought in the High Court of *Griqualand West* by *Webb,* representing the *London and South African Exploration Company,* against *Giddy,* as Civil Commissioner for the district of *Kimberley,* in the province of *Griqualand West,* for an account and payment of moneys in respect of licences to diggers for diamonds upon an estate of the company called *Dorstfontein,* otherwise *Du Toit's Pan,* and for which, it is alleged, the Civil Commissioner is accountable by virtue of Proclamation No. 71 of 1871, issued by Sir *Henry Barkly,* the governor of the above province. The Defendant

(1) *Ante,* p. 889. (2) Law Rep. 2 H. L. 149, 170.

denied the claim of the company, and by a claim in reconvention sought to recover back moneys paid to the company in respect of licences.

The province of *Griqualand West*, in which the farm of *Dorstfontein* is situate, was formerly part of a large territory situate between the *Orange* and *Vaal* Rivers, called *Griqualand*, governed by Griqua chiefs. In the year 1848 a large number of Boers, who were British subjects, having occupied this territory, the sovereignty of it was assumed on behalf of Her Majesty. In the proclamation of Sir *Henry Smith*, the governor of the *Cape Colony* (dated the 3rd of February, 1848), by which the sovereignty was assumed, it was declared that the territory should be governed by the laws of that colony. In the year 1854 the British Crown relinquished its sovereignty of this territory. Thereupon parts of it fell under the dominion of Griqua chiefs, and other parts under that of the Boers, who claimed to be citizens of a republic which had been formed under the name of the *Orange Free State*. Numerous disputes occurred between these chiefs and the *Orange State* regarding the occupation and boundaries of the lands which they respectively claimed, but it is not necessary to go into them, as the grant under which the company holds the farm of *Dorstfontein* was made by the president of the *Orange Free State*, and it is not disputed that a good title to it has been derived from the Government of that State. In 1871 the sovereignty of *Griqualand West* was resumed on behalf of the British Crown by Sir *Henry Barkly*, acting under letters patent of the Queen of the 17th of May, 1871, which empowered him to annex certain districts north of the *Orange* River (with the consent of the native chiefs and tribes) to the dominion of the Crown.

It appears from the extracts of the written constitution of the *Orange State* set out in the record, and in the judgment of the learned recorder, that the legislative authority of the State was vested in the Volksraad. It also appears that it was declared that "the Roman-Dutch law should be the common law of the State where no other law has been made by the Volksraad."

The original grant from the president of the *Orange State* bears date the 4th of April, 1860. The material part is the following:—

"I hereby grant on perpetual quit-rent to *Abraham Pauls. du*

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Toit a certain farm or piece of ground named *Dorstfontein*, situate in the district of *Bloemfontein*, field cornetcy of '*Onder*,' *Modder* River, in extent according to guess 2580 morgen.

"This grant is made upon condition that all roads running over this land, or which hereafter, upon lawful authority, shall be made thereover, shall moreover remain free and unmolested, that this land will be subject to a public outspanning and grazing of the cattle of travellers under such conditions as are already or hereafter shall be made by law.

"That the said land will further be subject to all conditions and regulations as are already, or may in future, be fixed, referring to lands granted on the same conditions; and, lastly, that the owner shall be bound to the prompt payment of a yearly quit-rent of the sum of £1 10*s.* sterling."

On the 12th of May, 1862, by a deed duly registered, the farm was transferred to one *Geyer* for the price of £525; on the 6th of January, 1869, it was transferred to one *Van Wyk* for £870; and on the 24th of April, 1871, *Van Wyk* sold and transferred it to the company for £2600.

Diamonds were discovered in *Griqualand* in 1867, and upon the farm of *Dortsfontein* during the ownership of *Van Wyk*, who granted licences to diggers, which obtained the name of "Old Briefjes." It was no doubt owing to this discovery that he obtained a largely enhanced price for the estate from the company.

It is contended on the part of the Crown that under the grant in question, which is on perpetual quit-rent ("*voordurende erfpacht*"), a tenure well known to the Roman-Dutch law, being in all respects similar to the *emphyteusis* of the Roman law, the grantee has the usufruct only, and may not take any part of the land itself.

The Plaintiff does not deny that the Roman-Dutch law was the ordinary law of the *Orange State*, nor that a pure grant in "*erfpacht*" has under that law the above effect; but he contends that this grant has not, and was not intended to have, this limited operation, but gave the full ownership of the land to the grantee. He refers, in support of this contention, to the special terms of the grant itself, and relies upon certain Ordinances of the *Orange State*, and the Proclamations issued on behalf of Her Majesty.

It will be convenient to state some further facts before considering the effect of these Ordinances and Proclamations.

It does not appear that any claim was made by the government of the *Free State* to the moneys received from the diggers under the licences granted by *Van Wyk*.

When the company took possession of the farm, notices were issued by their agents to the diggers that no new licences would be issued, but that the holders of "Old Briefjes" might remain until the 15th of May, 1871. The diggers determined to set these notices at defiance, and to continue their workings on the farm. It appears that the company applied to the *Orange State* for assistance to protect the farm, but, not receiving it, and being unable to expel the intruders, a treaty was entered into between its agents and the diggers, who were represented by a "diggers' committee," which was embodied in a document of the date of the 15th of May, 1871, headed, "Rules and Regulations of the *Dorstfontein* Diggings." These rules provided that after the 15th of May, 1871, a fee of 10*s.* 6*d.* per month should be payable in advance by each digger to the proprietors, except those diggers who held briefs prior to the 15th of April, 1871 ("Old Briefjes"). The rules also contained a code of laws for the good government of the diggers.

Such was the state of things in the particular farm when the *Orange Free State* passed an important Ordinance, No. 3, 1871, relating generally to diamond-bearing farms. The title and preamble of the Ordinance are as follows:—

"Ordinance prescribing how farms, or ground situated within the boundaries of the *Orange Free State*, wherein precious stones and precious metals may be discovered, shall be dealt with for the future.

"Whereas precious stones have been discovered from time to time within the territory of the *Orange Free State:*

"And whereas there are reasons for believing that precious stones and metals will hereafter be discovered in this State, on farms or grounds wherein they have not hitherto been found, and that large quantities will be discovered on farms where they have already been found:

"And whereas imperative necessity exists, in order to the prevention of irregularities and violence, for framing regulations

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in regard to such farms or grounds situated within the limits of the *Orange Free State*, where precious stones or metals have already been or shall hereafter be found as above mentioned."

The material articles are the following:—

"Art. 1. That the owner or occupier of a farm or piece of ground on which precious stones or metals may be discovered, in case such owner desires to open diggings on his farm, shall immediately make known such discovery to the landrost of the district within whose jurisdiction the farm is situated."

The State President was thereupon to send a suitable person to report upon the facts.

"Art. 4. His Honour the State President is empowered, after the receipt of such report, to determine whether the interests of the country require that the land or fixed property on which precious stones or metals shall be found as aforesaid shall be, on payment of the value, provided the owner consents thereto, taken over by purchase, or whether the Government of the *Orange Free State* shall merely assume the superintendence over the diggings to be established there. The value of the land in question shall be fixed at £1 sterling per morgen or more for the mere ground, that is, exclusive of improvements made thereon, which latter shall be appraised by three valuators.

"Art. 5. In the event of the State President and the Executive Council resolving, by virtue of the foregoing Article, to buy in from the owner on account of the Government the ground in question, the owner shall, on payment of its value, transfer the same to the Government of the *Orange Free State*, and the same shall then be proclaimed in the Government *Gazette* by the State President as the property of Government.

Art. 6. His Honour the State President, with the Executive Council, is hereby empowered on behalf of Government to open to the public for digging such land as shall have been taken over by purchase for Government as aforesaid, as well as such land as the owner by Article 4 may have refused to sell under such regulations as by this Ordinance are made or hereafter may be made, and the State President shall give notice thereof by proclamation.

"Art. 7. In the event of the State President and Executive

Council resolving to open any property for digging a Government functionary shall immediately be placed there to be styled the 'Government Inspector,' on whom shall be conferred the authority of a justice of the peace by virtue of this Ordinance, as defined by Ordinance No. 2 of 1870.

"The Government Inspector shall keep the general control over such property, and shall, in the name of the Government, and by authority of his Honour the President and Executive Council, in the leasing out of digging claims, each claim not to exceed 30 feet square, at a monthly licence of 10*s.* or more, and under the following conditions, among which are:—

"A. That the person or persons making application to the Government Inspector for permission to dig, if not an inhabitant of the *Orange Free State,* shall sign a written promise, in presence of the Government Inspector, to obey the laws of the country, before being allowed to search for precious stones or precious metals.

"B. That the licences shall be paid monthly in advance to the Government Inspector on behalf of the Government.

"C. That no digging claim shall be made over by one digger to another without the permission of the Government Inspector.

"Art. 9. On every farm where diggings are opened a committee of management shall be appointed, consisting of six members, of which the Government Inspector or his substitute shall be the *ex officio* chairman; the members of the committee of management shall be chosen from and by the diggers on the spot.

"Art. 10. The committee of management shall have power to frame such regulations as may be found necessary for the good order, local requirements, and social management of the diggings, but will be required to give immediate notice thereof to the State President, and they shall be subject to the approval of the Executive Council.

"Art. 16. In the event of his Honour the State President and the Executive Council deciding, by virtue of Article 4 of this Ordinance, that the Government will not take over by compensation the farms where precious stones and precious metals are discovered, the Government shall still permit digging on such farms under Government superintendence, and further, under

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such regulations as already have been or hereafter may be made regarding farms taken over by Government by compensation.

"Art. 17. On farms on which diggings are established, and coming under the head of those mentioned in the preceding Article, the Government Inspector shall pay over the half of the pecuniary proceeds of all licences for claims to the owners of those farms or their lawful agents on their giving receipt, and the other half shall by those officers be accounted for as prescribed by Article 14 of this Ordinance, in order to defray the expenses of Government connected with keeping up an oversight over the diggings."

A doubt might arise upon the language of this Ordinance whether it applied to farms on which diggings had been already opened. But the inference from Article 20, which is in these terms: "Article 1 of this Ordinance shall not apply to farms on which diggings have already been opened," clearly is, that so much of the rest of the Ordinance as can be made applicable to them should apply to such farms. Such, it appears, was the contemporaneous exposition given to it by the Government of the *Orange State*, for under its provisions a Government Inspector took charge of the diggings at *Dorstfontein*, and his appointment was notified to the proprietors in a letter from the Government Secretary, which, after stating that the State President had, in terms of Article 16 of the Ordinance, determined to throw open for digging the farms of *Bloemfontein* and *Du Toit's Pan*, and appointed Mr. *Finlason* as Government Inspector, contains the following passages: "You will notice that according to the Ordinance the half of licence money for 'claims' belongs to the owners of the farms. I have also been instructed to request you to inform me whether the owners of *Bloemfontein* and *Du Toit's Pan* would be inclined to sell those farms, and at what price."

This Ordinance is strongly relied on by the company as an acknowledgment and declaration by the State Legislature that the diamonds belonged to the proprietors of the farms, whilst on the part of the Crown it is contended that its provisions are consistent with the State having the right to them. In support of the latter view, it was pointed out that the licences were to be granted by the Government Inspector, and the licence moneys, in

the first instance at least, received by him; and it was submitted that the payment of the half of these moneys to the owners of the farms may have been intended to compensate them for surface or other damage done to the farms.

These considerations are not without force; but their Lordships think that there are considerations still stronger which point to an opposite conclusion. The case on the part of the Crown is that the original grant was in "*erfpacht*," a pure emphyteutic tenure, under which the owners of the farm would have no right whatever to the diamonds. The Ordinance does not apparently deal with a tenure of this nature. If such a tenure had been in the contemplation of the Legislature some express assertion of the right of the State would probably have been found in the Ordinance. Not only is no such assertion to be found in it, but the provision in Article 1 which provides that the owner of a farm on which precious stones or metals may be discovered, "in case such owner desires to open diggings on his farm," shall make known such discovery to the landrost, appears to assume that such owner has the right to open them. It is true that this Article refers to future discoveries only; but there is evidence, which is not controverted, that all the grants made by the *Free State* were in the form of that now in question, and the operation of all grants in that form would presumably be the same.

What the State mainly provides for in this Ordinance is the superintendence of the diggings by its own officers. It is true that it takes powers to purchase farms on which diamonds shall be found, but only with the consent of the owners, and the State President is to determine whether the interests of the country require that a particular estate should be so purchased, or whether the Government should "merely assume the superintendence over the diggings to be established there." (Article 4.) Then in cases where this superintendence is exercised, the Government Inspector is to pay over half of the pecuniary proceeds of all licences for claims to the owners of the farms, and to account for the other half to the State "in order to defray the expenses of the Government connected with keeping up an oversight over the diggings." Thus whilst the owner of the estate gets a clear half of the proceeds, the State takes the other half only for the purpose of

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defraying the expenses of its superintendence, which, whilst necessary for preserving public order, is perhaps more necessary for the protection of the interests of the owners of the farms. The State apparently asserts no right to these proceeds as being the owner of the minerals, and the Ordinance appears to be based throughout on the assumption that no such ownership existed.

On the 10th of July, 1871, by virtue of Article 10 of the above Ordinance, Regulations were drawn up by the Committee of Management constituted by Article 9, and were approved by the *Free State* Government. These Regulations appear to have taken the place of those of the 15th of May, 1871, already referred to. The same amount of licence fee, viz., 10*s.* 6*d.* per month, with the exception of "Old Briefjes," was payable under both sets of Regulations. It appears that the Plaintiff, as the agent of the company, received these licence fees from the diggers, and paid over one-half of the amount to Mr. *Finlason*, the Government Inspector.

Witnesses were called on both sides to shew what had been done under similar grants, and it certainly appears that the holders of them had cut wood, and taken coal, gravel, and other minerals without any interference by the State. The Recorder has correctly said that evidence of this kind would not be admissible to expound the Roman-Dutch law, but it appears to their Lordships that it would be admissible to shew that, as a fact, this law had not been adopted in its integrity by the *Orange State* in making these grants. The evidence, however, is of little weight, compared with the documents in the case, and the authentic proof of the action of the State in dealing with the diamond fields.

Such was the existing state of things when the sovereignty of *Griqualand West* was resumed by the British Crown. On that occasion a series of Proclamations was issued by Sir *Henry Barkly*, Governor of the *Cape Colony*, all bearing the date of the 27th of October, 1871. By one (No. 67) *Griqualand* was declared to be British territory; and by another (No. 68) the laws and usages of the *Cape Colony* were declared to be the laws of the territory "so far as the same shall not be inapplicable thereto." Nos. 71 and 72 touch more directly the questions in controversy in the present suit. The preamble of No. 72 explains its object. It recites that doubts may be entertained by the inhabitants of the terri-

tory, especially those occupying lands in the portions thereof the sovereignty over which has heretofore been in dispute between the Chief *Waterboer* and the Governments of the *Orange Free State* and *South African Republic*, as to the intention of Her Majesty in extending her sovereignty over the territory with respect to the titles of the inhabitants to the lands held by them, and that it was resolved to quiet such apprehensions. The Proclamation then declares that Her Majesty had no intention "to invalidate or prejudicially to affect or injure in any way" rights or titles of private persons to lands; and that all such titles would be respected and considered valid and confirmed by Her Majesty, as would under the laws of the State and Government under which such persons were living *de facto* have been considered valid by such State or Government.

No. 71 deals with diamond diggings. The preamble of this Proclamation states that "it is expedient that certain rules and regulations should be established under which the search or digging for diamonds shall be carried on within the territory of *Griqualand West*;" and its provisions are made applicable "whenever diamond diggings shall have been already opened, or shall be opened within the territory." The Proclamation divides the lands on which diggings are opened into three classes:—

I. Crown lands. (Art. 1.)

II. Lands "the property of any private person, the title to which lands is or shall be subject, in the original grant thereof, to a reservation of the right to precious stones or minerals." (Art. 23.)

III. "Lands the property of any private person, the title to which lands is not subject to any reservation of precious stones or minerals." (Art. 29.)

It provides for the appointment of a Government Inspector, Committees of Diggers, and for the manner in which rules and regulations for the management of the diggings shall be framed.

With regard to Crown lands it provides that the licence money or royalty in respect of each claim shall be 5*s*. per month, where the claim is worked by not more than three persons, and higher proportionate rates where worked by more persons.

With regard to Class II. the licence money or royalty is to go

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to the Crown, as in the case of Crown lands, but the private owner is to be paid reasonable compensation for all injury done "to the surface and soil of the lands" by the diggings.

With respect to Class III. the provisions are of a different nature, and as the Plaintiff claims under this class, and his action is founded on the provisions relating to it, it will be necessary to refer to them to see (1) whether his case does fall within this class, or, as the Crown contends, within Class II., and (2) whether they will sustain the claims made in the action.

These provisions are found in Article 29, which, in substance, declares that whenever diamond diggings are opened in lands in Class III., and the private owner "shall desire to establish diamond diggings on the property," and shall have granted licences to the defined number of diggers, the land shall be deemed a "public diamond field," and may be proclaimed as such, as if it were Crown land. When so declared the regulation with respect to the inspector, and other regulations, are to be applicable as in Crown lands, with the following important variations:—

"Save that the amount of licence money, rent, or royalty to be paid for each claim shall be fixed by the owner of such property as aforesaid whereon such diamond field shall be situate, not being less upon each claim of 900 square feet, or, in proportion to the superficial extent of the claim, not being less than would be leviable on the same extent if each claim were 900 square feet in dimension than the amount of monthly licence duty, royalty, or rent hereinbefore provided in respect of claims upon Crown lands; and the licence moneys, royalties, or rents payable by the miners or diggers entitled to work any claim therein shall be accounted for monthly by the Civil Commissioner of the division to the owner of the property whereon such diamond field is situate; and the balance of such licence moneys, royalties, or rents, after deducting therefrom the proportion of £10 for every £100 thereof, or in the like proportion at the least, and such further sum, if any, as may be necessary to defray the public expenditure in respect of the establishment necessary for the maintenance of order and good government at such diamond field, shall be paid to such owner of such property as aforesaid, whereon such diamond field shall be situate: Provided, also, that no rules or regulations

passed or made, or to be passed or made, by any such public meeting of miners as aforesaid, shall be valid which shall affect the rights of such proprietor or define the compensation which shall be made to him for interference with any of his rights as such proprietor, without his express concurrence in such rules, either in person or through his lawful attorney thereto authorized."

It was contended for the Plaintiff that "the reservations" mentioned in defining Classes II. and III., referred to express reservations in the original grant, and forms of Government grants upon quit-rents having such express reservations were shewn to be in use in certain cases in the *Cape Colony*. If this contention were successful, the Plaintiff's title would clearly fall within Class III., but their Lordships are not prepared to decide the case simply upon this construction. They are, however, of opinion upon the whole case that the title of the Plaintiff does fall within Class III.

It is to be observed that private owners in Class III. are dealt with in the 29th Article of the Proclamation much in the same manner as owners of lands are dealt with by Ordinance No. 3, 1871, of the *Orange Free State*.

The Proclamation by adopting, in Article 29, these provisions of the Ordinance, seems to assume that the grants in Class III. would include those to which the Ordinance referred; and throughout this Article there are indications that the Government had in view the grants of the *Orange State* under which the lands dealt with by Ordinance No. 3, 1871, were held. Thus the Ordinance required private owners to give notice to the State, "in case such owner desires to open diggings on his farm," upon which the State was to assume the superintendence of them. In like manner Article 29 of the Proclamation provides that when a private owner "shall desire to establish diamond diggings on such property," and shall have granted a given number of licences over a given quantity of land, that place "shall be deemed to be a public diamond field, and proclaimed as such," and is then to be subject to Government control.

The analogy between the Ordinance and the 39th Article of the Proclamation in the manner of dealing with the licence money is still more important. By the Ordinance one half of the licence money was to be paid to the private owners, and the other half to

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the State, to defray the expenses of its "oversight over the diggings." By Article 29 of the Proclamation the whole of the licence moneys, after deducting 10 per cent., and such further sum as may be necessary for defraying the public expenditure for maintaining order, is to be paid to the private owners. The principle in both cases is the same, viz., the State takes what is necessary for defraying the expenses of maintaining order, which by the Ordinance are assumed to amount to one-half of the licence money, whilst by the Proclamation the actual expenses, whatever the amount may be, are to be deducted.

Again, the distinction with regard to licence moneys between Class II. and III., the owners in the former class receiving no part of them, but only compensation for surface and other damage, shews that it could not have been intended to include in Class II. the grants of the *Orange State* dealt with by the Ordinance under which the owners received one clear half of these moneys, whilst, by following the provisions of the Ordinance in the respects above adverted to in dealing with Class III., an intention is indicated to include those grants within that class.

In fact the Government so understood its own Proclamation.

Three Commissioners having been appointed by Sir *H. Barkly* to act for him in administering the affairs of the Province, two of them issued the following Proclamation (dated the 17th of November, 1871) proclaiming a certain area of Plaintiff's farm to be diamond fields:—

"Whereas diamonds have been discovered upon a certain farm or portion of land, in extent about five thousand morgen, more or less, commonly called *Dorstfontein* or *Du Toit's Pan*, being private property within the territory of *Griqualand West*, as defined by the proclamation of his Excellency Sir *Henry Barkly*, Governor of the *Cape of Good Hope*, of the twenty-seventh day of October, eighteen hundred and seventy-one, No. 67, the title to which is not subject to any reservation of precious stones or minerals. And whereas, in the vicinity of certain claims or licences now being worked upon the said property, a population is now settled for the time being of more than one hundred persons. Now, therefore, we, the undersigned Commissioners, appointed by and under the proclamation of his Excellency Sir *Henry Barkly*, Governor

of the *Cape of Good Hope*, of the twenty-seventh day of October, eighteen hundred and seventy-one, No. 73, do, by virtue of the power thereby conferred on us, proclaim a certain area, being portion of the said farm *Dorstfontein* or *Du Toit's Pan*, being the place where such claims or licences are now being worked or lying to be worked as aforesaid, to be public diamond fields, under and by virtue of the Government Proclamation of October the twenty-seventh, eighteen hundred and seventy-one, No. 71."

This Proclamation not only affirms *Dorstfontein* to be within Class III., but proclaims a portion of it to be diamond fields in pursuance of Article 29.

For three years the Government acted on the footing of this Proclamation, and paid over large sums on account of licence moneys to the agents of the company.

In the year 1874, for the first time, the Government of the province, contending that the grant in question fell within Class II., denied the right of the company to the minerals, and thereupon the present action was brought.

The whole case of the Crown rests upon the form of the original grant, and upon the assumption that it created an emphyteutic tenure only. There is no doubt that by Roman-Dutch law a grant on perpetual quit-rent is understood to be a grant in *emphyteusis*, and that under it the grantee has the usufruct only, and not the right to minerals. This tenure and its incidents are clearly explained in the passage from *Voet*, 6, 3, 11, cited in the judgment of the learned Recorder, and by the passages from the Introduction to Dutch Jurisprudence, by *Grotius*, cited by the learned counsel for the Crown from *Herbert's* Translation, c. 40. A succinct definition of the tenure is also given by *Van Leeuwen* (*Censura Forensis*, lib. 11, c. 16): "*Emphyteusis est jus hæreditarium prædio alieno utendi vel fruendi, sub onere meliorationis, et præstandi annui Canonis in recognitionem directi dominii.*"

The *onus meliorationis* is not mentioned by *Grotius* as a condition of the tenure, and in the passage from *Voet* above alluded to, it is stated that the tenant accepts the land either on condition of improving it, or at least *secundum mores hodiernos* of not deteriorating it.

Now the grant from the *Orange State* is a grant on perpetual

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quit-rent, and the rent is reserved by the word *recognitie* (a Dutch word), which is said to mean *recognitio directi dominii.* See *Van Leeuwen's* definition.

But though this be so, the grant is not confined to this simple form, leaving only the ordinary incidents of an emphyteutic tenure to attach to it, but is made subject to provisions as to public roads; the "outspanning and grazing" of the cattle of strangers; and is also upon condition "that the land will further be subject to all conditions and regulations which are already, or may in future be, fixed, referring to land granted on the same conditions." Undoubtedly new incidents may be attached to an emphyteutic grant, which would not affect the nature of the tenure, and the provisions as to public roads and grazing may be of this kind; but the last condition indicates that it was not supposed or intended that the grant conferred a simple *emphyteusis.* It is indeed a special grant, making the land subject to the conditions imposed or to be imposed by the State. Now the State, as we have already seen, did impose conditions upon the working of diamonds, under which the State took one-half of the licence moneys for defraying the expenses of its superintendence of the diggings, but paying the other half to the owner of the farm, apparently on the assumption, as before pointed out, that the tenure was not an *emphyteusis,* but one which gave the owner a beneficial right to the minerals. This special grant may, in their Lordships' view, be properly construed by the light of the Ordinance No. 3, 1871, which may be considered to be, as already stated, a legislative declaration by the Volksraad of its effect.

It is to be observed that the Roman-Dutch law was declared to be the common law of the *Orange State* only "where no other law has been made by the Volksraad." It may well be that the Boers who formed the people of this State intended, in making these grants, to confer full proprietary rights on the grantees, and that, whilst adopting in some respects the emphyteutic form of grant, it was not intended to confer upon the grantees usufructuary interests only.

Their Lordships are therefore brought to the conclusion that the *Orange State* could not have lawfully claimed the property of the minerals on this farm, and if so, the Crown cannot claim them,

and is bound by the terms of the before-mentioned Proclamation for quieting titles acquired prior to its resumption of sovereignty over this territory.

The Proclamation relating to *Dorstfontein* itself, and the action of the British authorities already commented upon, may not alone be conclusive as to the title of the Plaintiff to the minerals, if mistake could be shewn; but they afford conclusive evidence that such a title was in fact recognised and allowed by the authorities as that which had been acquired under the *Orange State*. After this solemn recognition of the Plaintiff's title to the minerals, it is too late for the Crown, without any evidence that its officers acted from mistake, and in opposition not only to its own action, but to that of the *Orange State*, to impeach the title of the company upon a presumption derived only from the form of the grant.

Their Lordships are therefore of opinion that the Plaintiff is entitled to maintain this action under Article 29 of Proclamation No. 71.

This decision disposes of the main question in the appeal of the Crown, and also, as a consequence of it, of the claim in reconvention.

There remains to be considered in the appeal of the Plaintiff his claim, which was disallowed by the learned Recorder, for an account and payment of licence moneys upon a higher rate than the Crown has accounted for. It appears that the company, acting under the power assumed to be given to owners under Article 29 of No. 71, raised the amount of licence money from 10*s.* 6*d.* per month, at which sum it had long stood, and fixed it "at 50*s.* per claim per month." Formal notices thereof were given to the Government on the 11th of August, 1873, and also to some of the diggers. The officers of the Government have not received these increased rates, nor, indeed, have the diggers assented to them. Their Lordships intimated in the course of the argument that under these circumstances the claim to an account and payment of licence money on the footing of these notices could not be sustained, and they understood the counsel for the Plaintiff to acquiesce in that intimation. Any complaint the Plaintiff may have (if he has any) against the Government for not acting on the above notice must be pursued in some other form.

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The Plaintiff's counsel strongly urged their Lordships to advise Her Majesty to declare that the company was entitled to alter and fix the licence moneys or rents at its discretion, month by month. They do not, however, feel justified in complying with this request. It is sufficient to say that the present suit is not framed to obtain a declaration of this kind. Their Lordships, therefore, need not consider, as they would have been compelled to do if the question had properly come before them, whether the diggers ought to be made parties to a suit for such a purpose. Their Lordships, however, desire to say that they are not to be understood to affirm the principle on which the learned Recorder based his judgment in dealing with the question of the power to raise the licence rents, viz.:—"That 10*s.* 6*d.* having been fixed by compact between the diggers and the Plaintiffs, and that compact having been embodied in the rules of the 10th of July, 1871, and afterwards perpetuated by the Government notice, dated the 30th of December, 1871, the Plaintiffs cannot now arbitrarily raise the licences." The question of increasing the rents was not, as already stated, properly raised in the present suit, and must be considered as open for decision in any suit in which it may hereafter arise.

In the result their Lordships will humbly advise Her Majesty to affirm the judgment appealed from. Both appeals having failed, there will be no order as to costs.

Solicitor for the Appellant: *Algernon E. Sydney.*
Solicitors for the Respondent: *Bircham & Co.*

[HOUSE OF LORDS.]

THOMAS CHALONER . . . . . APPELLANT; AND HENRY W. F. BOLCKOW . . . . . RESPONDENT.

H. L. (E.) 1878 April 12.

Taxes—Deduction—37 & 38 *Vict. c.* 54.

A lease of an iron mine, made in 1855 (not being then liable to poor-rate), contained covenants for the payment of certain rents and royalties, and these payments were to be made free and clear of all rates and taxes imposed by parliament or otherwise . . . . "free from all deductions whatsoever;" and there was a covenant to pay "all manner of taxes, &c., which now are or which shall at any time hereafter, during the continuance of this demise, be imposed," landlord's property tax excepted. By the *Rating Act* of 1874, 37 & 38 Vict. c. 54, s. 3, the 43 Eliz. c. 2, was extended to mines "of every kind not mentioned in the recited Act," but the 8th section provided that where the lessee of a mine was, at the commencement of the Act, exempt from the payment of poor-rate, which was afterwards made payable, he might deduct one-half from the rent "(unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption):"—

Held, that under this section the tenant here might deduct half of the rate from his rent, for that he had not, within the words of the section, "specifically contracted" to pay such rate.

APPEAL from a decision of the Court of Appeal which had affirmed a previous decision of the Court of Common Pleas.

By an indenture of lease dated the 19th of February, 1855, the Respondent became tenant to the Appellant of certain ironstone mines at certain rents and royalties therein named. The lease contained a covenant to pay the rents and royalties "free and clear of and from all cesses, taxes, rates, charges, and impositions whatsoever, laid or imposed, or hereafter to be charged, laid or imposed upon the said demised premises, or any part thereof, either by Act of Parliament or otherwise howsoever, except landlord's property tax."

The lease also contained the general covenant to pay the rents, &c., "free from all deductions whatsoever," and then followed these words: "And also shall and will pay, or cause to be paid, all manner of taxes, rates, assessments, charges and impositions whatsoever, parliamentary or parochial, which now are, or which shall

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at any time or times hereafter, during the continuance of this demise, be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property tax only excepted."

In consequence of the passing of the *Rating Act* of 1874 (1), a sum of £66 13*s.* 4*d.* became payable for poor-rates in respect of the demised premises, and the tenant claimed under the 8th section of that statute to deduct half that sum out of the rent payable by him.

The Appellant brought an action in the Court of Common Pleas to determine the question, and that Court gave judgment for the Defendant, which judgment was affirmed by the Court of Appeal, and the present appeal was then brought. There was no question as to the amount; the sole question was on the construction of the lease and the Act.

The Solicitor General (Sir *H. Giffard*), and Mr. *A. L. Smith*, for the Appellant:—

The covenant to pay all taxes, of whatever sort, is in this lease clear and distinct; they are to be paid whether they "are now" or "at any time hereafter may be imposed;" there is nothing whatever which in any way points to an exception from this universal liability. The Act on which reliance is placed does not destroy the effect of the all inclusive words of the lease. For it cannot be denied that there is here a specific contract to pay all taxes whatever, except the landlord's property tax, and that was, and was intended to be, the only exception to the liability under the contract. The words of the lease really included, and were

(1) 37 & 38 Vict. c. 54. This statute was passed after the decision, in this House, of *Morgan* v. *Crawshay*, Law Rep. 5 H. L. 304. The 3rd section extends the liability to rating unto "mines of every kind not mentioned in the" 43 Eliz. c. 2.

The 8th section enacts that "where any poor or other local rate which, at the commencement of this Act, any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuation of his lease, grant, or licence, or before the arrival of the period at which the amount of the rent, royalty, or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty, or dues payable by him one-half of any such rate paid by him."

meant to include, all existing taxes, and all those which might be afterwards imposed. The case of *The Duke of Devonshire* v. *The Barrow Steel Company* (1) was therefore distinguishable from the present, for there the rents and royalties agreed to be paid were to be paid free from "all rates, taxes, tithe rent-charges, expenses, and deductions whatsoever, parliamentary, parochial, or of any other nature," and those words referred only to existing taxes. There was there no covenant which could be applied to rates or taxes created in future. There is such a covenant here. When, therefore, the mines became liable to this taxation, the case was that of a liability newly created by Act of Parliament and wholly dependent on the words of the particular Act. It was a liability "hereafter imposed." The tenant at the time of making the lease was not exempt; that word, which is used in the 8th section of the statute, is not applicable here, for properly speaking there can be no exemption from a thing which has no existence. The Act does not remove an existing exemption, but creates a new liability; the new liability falls within the description of "all rents and taxes whatsoever hereafter to be imposed," and by the very terms of the lease itself the lessee is bound to pay them. He had "specifically contracted" to do so (2).

Mr. *Holl*, Q.C., and Mr. *R. V. Williams*, for the Respondent, were not called on to address the House.

LORD HATHERLEY:—

My Lords, I think we are much indebted to the able argument of the learned Solicitor-General, who appears to me to have said everything that could possibly be said in support of the appeal, but I do not think that any of your Lordships have been persuaded that there is any error in the decisions which have been come to in the Courts below, either upon the original hearing or in the Court of Appeal. The Judges in each of those Courts appear unanimously to have adopted one construction of the *Rating Act*

(1) 2 Q. B. D. 286.

(2) See on this subject of agreements as to deductions for taxes, *Bradbury* v. *Wright*, Doug. 624; *Parish* v. *Sleeman*, 1 De G. F. & J. 326; *Festing* v. *Taylor*, 3 B. & S. 217; see also as to one of the sections of this statute, *The Van Mining Company* v. *The Overseers of Llanidloes*, 1 Ex. D. 310.

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of 1874, a construction no doubt founded in some degree upon *The Duke of Devonshire's Case* (1), but I am bound to say that that is not altogether a case which gives rise justly and precisely to the line of argument which I feel myself compelled to adopt as regards the case now before us.

In that case the covenant was not so strong as it is in this. It was not a covenant to pay all present and future taxes, but a general covenant to pay the rent free from all taxes and rates which were there specially mentioned, the covenant not being in express terms extended to future rates and future taxes. But I will call your Lordships' attention to what the Lord Chief Justice says in that case, though it had a stronger application to the case then before him than it would have to this. I mean to say it was more open to the construction he put upon it in the case before him, than it might have been if there had been a special reference to future rates. What he says is this, and I take this to be the meaning of the Act, and I adopt, therefore, his reasoning to that extent, "That statute takes away the exemption from rating which mines other than coal mines formerly enjoyed; nevertheless, the 8th section provides for mining leases which were in existence when the statute was passed, and enacts that, as a general rule, the lessee may deduct from the rent, royalties, or dues payable by him one-half of any rate imposed upon him; but the exception is introduced that where the lessee has specifically contracted to pay the rates in the event of the abolition of the exemption, the contract between him and the lessor shall hold good. In my opinion we must give due effect to the words 'specifically contracted,' and I understand the meaning of the 8th section to be, that where the contract existing at the time of the passing of the Act is general only, that is, where the tenant is liable to all rates and taxes, and is to pay to the lessor a certain rent or royalty, he is to be at liberty to deduct one-half of the rates imposed upon him by virtue of the statute; but that if the parties to the lease have, in direct terms, provided for the contingency of the Legislature taking away the exemption, the lessee shall be liable to pay the whole of the rent and royalty, as he did before the statute was passed. I think that in order to exempt the lessor from the

(1) 2 Q. B. D. 286.

deduction of one-half the rate, the contract of demise must contain some specific reference to the possible abolition of the exemption by Parliament, and that where no such reference is inserted, and the language is general, as in the lease before us, it cannot be said that a specific contract exists within the meaning of the 8th section."

Now, my Lords, I apprehend that that is really the true construction of this Act of Parliament. The Legislature begins by reciting the Act of *Elizabeth*, and then the legislative measure is framed in a somewhat singular form. It enacts that certain things, which it enumerates, namely, underwood, game, and mines, shall be in future subject to the statute of *Elizabeth*, just in the same manner as if they were mentioned in the recited Act of Queen *Elizabeth*, that is to say, the Legislature chooses to deal with this matter in a peculiar fashion; not *simpliciter*, imposing a new rate or a new tax on the subject matters, but saying, here is an existing Act of Parliament under which certain property has always been rated; there is certain other property which for some cause, whatever that may be, has not been considered to be included in that Act; we do not say *simpliciter* we will now impose a new duty, but we point to this Act of *Elizabeth* as shewing what the Legislature formerly thought to be the justice of the case, and we say that, in our judgment, at the present time, we think these descriptions of property should be subject to the same imposts and taxes as other property, therefore we enact that these descriptions of property which have not hitherto been considered as affected by the statute of *Elizabeth* shall be dealt with as if they were included in that statute.

My Lords, the term "exemption," which, as the Solicitor-General pointed out, is not the most correct and appropriate term to use, has acquired a certain degree of appropriateness by the form in which the previous section of the Act is drawn. The previous section took the form of inserting certain things into the Act of *Elizabeth;* that is practically the form adopted. The Legislature then says, That puts an end to the exemption of those things from the rate, and now that that exemption is gone, we will consider upon whom the incidence of rating is to fall. That being done, it is said, almost in express terms, in the 8th section that, as an

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abstract matter, it is right in respect of this rate about to be introduced for the first time, that the incidence should be equally upon the landlord and upon the tenant. That was considered to be the justice of the case. But then it was recollected upon coming to the 8th section (this seems to me to be the right view to take of it) that, as this matter has been often discussed and often considered, there may be leases in existence in which, independently of the general covenant which most leases contain to pay all rates and taxes, whether limited to the present or extended to the future, there may likewise be certain leases in which it may have been foreseen that the time would come when this special description of property would be made subject to rating, and that the parties may have dealt with each other upon the footing of the possibility of this exemption being taken away, and of this particular property being subjected to the same rating as all other property is under the Act of *Elizabeth*, and that they may have come to a special agreement between themselves, the tenant saying that not only will he pay all future taxes, but specially, if there should be an Act of Parliament passed hereafter subjecting this particular property to any future rate, he intends to include that future rate among the rest, and will pay it also.

My Lords, looking to the Act of Parliament, it is perfectly clear that you cannot find, in a general covenant to pay all rates and taxes, whether future or past, what the Legislature meant by the words "specifically contracted" to pay this particular tax. The strongest words in the deed before us are these, "will pay or cause to be paid all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property tax only excepted." Now I conceive it to be quite impossible reading through that clause to apply the word "specifically" to any part of it. "Specific" is ordinarily used in the common parlance of language as meaning distinct from general; and when you find a general covenant to pay all rates I should think it is almost the opposite to a specific covenant to pay a particular rate. And when the Legislature says, as it does here,

that the case is intended to be excepted when it comes within these words, "unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption," you cannot (I agree with Lord Justice *Brett* in this) find in these general words to pay "all manner of taxes, rates, assessments," and so on, anything that will correspond with the expression "specifically contracted to pay such rate." I leave out purposely for the moment "in the event of the abolition of the said exemption;" but in reality that makes it somewhat stronger in favour of the construction which I feel myself bound to adopt of the words "specifically contracted to pay such rate."

The Solicitor-General asks how the words can be applied so as properly to include that which was not *in rerum nâtura* at the time, namely, a possible rate which might hereafter be imposed in any shape or form whatever. I apprehend, my Lords, that there would be no such difficulty as that. It might well have been that instead of simply being confined to all rates and taxes at present imposed, or to be imposed hereafter, the lease might have contained a covenant (especially after the agitation which had existed for some time with reference to this so-called exemption, or more properly absence of taxation upon the particular property in question), it might have contained a covenant saying that the tenant would pay all rates to be imposed, and more particularly any rate which may be imposed upon mines on the same footing as that on which other property is rated under the Act of *Elizabeth*. It was known that there was, though not in the strictest parlance exemption, yet that there was an absence of taxation with regard to that particular property, and considering that it was very possible that the time would come, as it did, when that kind of taxation would be imposed upon all property of the character named in this Act, there might well have been a special agreement that that particular tax should be paid also; otherwise the Legislature seems to have thought that, according to a just view of the whole matter, the tax should be borne equally, and must be considered to have said, We will not exempt the landlord from this just contribution to the tax in any case unless we should find that, in addition to the general covenant he has required for the payment of all taxes by the tenant, he has also made a special and specific agreement that this particular tax which is now being imposed

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should also be one that should be borne by the tenant and the tenant alone.

Now if you add the words "in the event of the abolition of the said exemption," that makes the argument still stronger, if it is necessary that it should be stronger. I think, in the first place, the general covenant to pay all rates and taxes to be imposed cannot be in any sense of the word called a specific covenant to pay a particular tax; and, secondly, "in the event of the abolition of the said exemption," points at once to this, that the Legislature was contemplating a case which might well occur; whether it has ever done so or not it is impossible to say—one would need to see a lease, and I have never seen a lease containing such a covenant—but the Legislature appears to have thought it very possible that persons who were covenanting together would be looking forward to this particular event, and that in contemplating this particular event the tenant might engage to accept that particular rate by a specific covenant.

I think, my Lords, that that is the plain meaning of this clause; and though, possibly, now that we know all the circumstances of the case which has occurred, we may think that it might have been better expressed, yet I think it sufficiently points out what is the proper decision to be come to in this case, and that appears to me to be the decision which has been come to in both the Courts below. Therefore, my Lords, I think that that decision ought to be affirmed, and the present appeal dismissed with costs.

LORD BLACKBURN:—

My Lords, I am entirely of the same opinion. The question really turns, entirely in my mind, upon the true construction of the 8th section of this Act of Parliament, and particularly upon the true construction of that portion which is put between the brackets—the parenthesis, as it is called. Whilst I have come to exactly the same conclusion as that which has been expressed by my noble and learned friend now on the woolsack—a conclusion in which also both the Courts below agreed—I cannot say that I think that the Act is so worded as to make it perfectly clear. I do not think it is a clear clause at all; but upon looking at the Act carefully, and considering the general words, I come, without

any doubt or hesitation, to the conclusion that the true construction is that which has been put upon it.

The Legislature, wisely or foolishly, rightly or wrongly, thought fit to place a tax, the poor-rate, upon the occupiers of mines upon which mines it had not been so placed before. If that had been done *simpliciter*, the occupier of a mine, the lessee, or tenant, would have had to pay it all, and the landlord would still have drawn his rent just the same as if no such poor-rate had been imposed on the tenant. The tenant would then have had to bear the whole of the tax. Now, it seems to have been pointed out, and it was true, that there would be a great many existing leases where, when the lessors were bargaining for the rent, they got a higher rent or royalty (leases and licences would be the same in that respect) than they would have got if the poor-rate had been existing upon the mines, in which case the tenant would have offered less, and the landlord would have taken less. That being pointed out, the Legislature, by the 8th section, said in effect this: "Where there is an existing lease made before this time, under which the landlord has presumably got a higher rent than he would have got if this tax had then existed, the tax shall be apportioned and the landlord shall bear one-half of it." The proviso at the end of the clause says, however, that that half of the rate shall be as regarded his amount of rent or royalty, and no more, and that the tenant shall pay the rest. I think that would be equitable enough (assuming always that such a tax was to be imposed) as providing for the existing leases.

But then, my Lords, that seems to have been pointed out which everybody conversant with leases, and mining leases in particular, knows, namely, that in a great many leases there were such provisions as we find in this lease—a general provision that the tenant shall and will pay "all manner of taxes, rates, assessments, charges, and impositions whatsoever, parliamentary or parochial, which now are, or which shall at any time or times hereafter during the continuance of this demise be, taxed, rated, charged, assessed, or imposed," and so forth. And then it seems to have been said: "That is a hard case upon the landlord, upon whom you are putting half the rate. It may be that he has made a bargain with his tenant when he granted the lease that he would take this rent in this very event, that the parties did contemplate the possibility

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of such a tax being put on, and that they did consequently fix the rent accordingly. If that was the view Parliament took, and if those were the objects and intentions of the Legislature, it could have been said simply, "unless where the tenant has expressly agreed to pay all rates;" and if that had been said it would have carried out what was meant. Then it seems to have occurred to some one to say this—and I do not myself think it would have been an absurd way of reasoning at all—"Many leases made long ago have in general terms agreed generally that the tenant should pay all rates," but the parties in so saying were not really thinking of this rate at all—do not let the exemption apply to leases in which there has merely been a general agreement to pay all rates; but it may be (and this was very possible), that as this notion of putting on the tax has been in agitation for some years, particular people have thought of it, and have specifically made an agreement pointing to the possibility of this particular rate being imposed, and agreed as to that; I do not myself know whether they did so or not, but it was a possible thing. Then the Legislature seems to have come to this compromise, if one may so call it, we will say during existing leases one-half, as far as regards the amount of rent, shall fall upon the landlord, and the other half upon the tenant; but there shall be an exception made from that, if in any case they have, by their agreement, pointed out that they had this particular rate in their minds, and agreed that the tenant should take his chance of having to bear it, and then the landlord shall not bear anything. But that shall not be so if they have done it in general terms; it shall only be so if they have done it by an agreement specifically pointing to this. I do not think that that would be an equivocal or an absurd arrangement at all. It is, I think, what the Legislature really meant to say; let us now see whether it has been said.

My Lords, the words in the parenthesis are "unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption." Here he has generally contracted to pay all rates, and thereby he has included in those general terms this rate. But can it be said that he has "specifically contracted to pay such rate," that is to say the poor-rate now imposed "in the event of the abolition of the said exemption?" I think not. I think the Solicitor-General's argument amounted to this, that we

are to read this parenthesis exactly as if it had been "unless he has contracted to pay all rates generally." If it had, in fact, been so, the Solicitor-General's argument would have been quite right; but then the use of the word "specifically" and the words "such rate in the event of the abolition of the said exemption" (those are not happily chosen words, I agree), would have no effect at all. I have not much doubt that what I have already stated was the intention of those who put them into the section. Taking that view of it, of course I quite agree that the construction put by the Courts below upon the Act of Parliament as applicable to this lease is the right one, and consequently I agree that the appeal should be dismissed with costs.

LORD GORDON:—

My Lords, I entirely concur with your Lordships as to the proposed disposal of this appeal from the unanimous judgment of the Court of Appeal and the other Court which preceded it. I cannot say that I look upon this as a very clear case.

In *Scotland* the poor-rate is laid one-half upon the landlord and one-half upon the tenant; by the law of *England* it is laid upon the occupier; and there appeared to have been an idea in the other House that probably it would be more equitable to adopt the Scotch system of rating as to mines which had not previously been subject to rating at all, and that the last clause of the 8th section has reference to that idea, so that in the event of the rate being laid upon mines the tenant might deduct one-half from the landlord according to his rent or royalty.

I feel satisfied that the opinion which has been expressed by your Lordships with reference to the proper construction of the Act is the correct one, and while I think that the other view is not incapable of argument, still, I am of opinion that the judgment ought to be affirmed.

Judgment appealed against affirmed, and appeal dismissed with costs.

Lords' Journals, 12th April, 1878.

Solicitor for Appellant: *W. C. Hall.*
Solicitors for Respondent: *Van Sandau & Cumming.*

[HOUSE OF LORDS.]

H. L. (E.) 1878 June 6.

EDWARD GARNETT . . . . . APPELLANT;

AND

WILLIAM BRADLEY . . . . . RESPONDENT.

Costs—Slander—Statute of James—The Judicature Acts—Order LV.

The statute 21 Jac. 1, c. 16, is (so far as the action for slander is concerned) repealed by the effect of Order LV. made under the authority of the Judicature Act of 1875 (38 & 39 Vict. c. 77) (1).

Where, therefore, a Plaintiff in an action for slander obtained a verdict, but recovered only one farthing damages, and the Judge declined to make any order or grant any certificate, and the Master taxed the costs for the Plaintiff in the ordinary way,

Held, that the Master was right—the costs under such circumstances following "the event."

Per LORD BLACKBURN:—Any Act which gives the Judges power to exercise their judicial discretion in every case as to costs, of necessity repealed previous Acts, which directed costs to follow certain rules, and gave the Judges no discretion whatever in the matter (2).

Parsons v. *Tinling* (3) approved.

An order, made on an application with reference to the taxation of costs, granted leave to appeal, and reserved the costs of the litigation for the Court of Appeal:

Held, that the costs thus reserved ought to be dealt with in the same manner as the costs of the appeal—and the judgment of the Court of Appeal being reversed in this House, the Respondent was ordered to repay the costs which he had received under the order now reversed.

THIS was an appeal against a judgment of the Court of Appeal which had reversed a previous judgment of the Exchequer.

(1) "Subject to the provisions of the Act, the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court; but nothing herein contained shall deprive a trustee, mortgagee, or other person, of any right to costs out of a particular estate or fund to which he would be entitled according to the rule hitherto acted upon in Courts of Equity: Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge, before whom such action or issue is tried, or the Court shall otherwise order."

(2) See, on this subject of repeal, by inconsistency in the provisions of two Acts of Parliament, *Green* v. *The Queen*, 1 App. Cas. 513.

(3) 2 C. P. D. 119.

The Appellant *Garnett* was an auctioneer carrying on business at *Sheffield*. On the 27th of January, 1877, *Garnett* was employed to sell a horse at *Chesterfield* market. Immediately after the sale, in the public market place, *Bradley*, as it was alleged, addressed to *Garnett* the following words, "You and your employers are a set of swindlers and thieves." *Garnett*, after an apology demanded, but not given, brought an action for slanderous words uttered of him in the way of his business. *Bradley* denied the uttering of the words, or that they were uttered of *Garnett* in the way of his business, or otherwise. The cause was tried at the Spring Assizes for *Derbyshire*, in 1877, before Lord Justice *Amphlett* and a common jury. A verdict was given for the Plaintiff with one farthing damages. An application was made to the learned Judge for a certificate to deprive the Plaintiff of costs, but his Lordship refused to make any order as to costs. In the Master's office the Plaintiff was allowed his full costs of action, and in answer to formal objections raised, the Master wrote: "I have reconsidered my taxation in this case, but am unable to allow the objections, as I consider myself bound by the decision in *Parsons* v. *Tinling*, 2 C. P. Div. 119." The matter was brought before Barons *Pollock* and *Huddleston* in the Exchequer Division, when they affirmed the course taken by the Master, but by their order made on the 3rd of May, 1877, granted leave to appeal, and reserved the costs for the Court of Appeal. The Defendant appealed, and the Judges of the Court of Appeal, the Lord Chief Baron *Kelly* and the Lords Justices *Bramwell* and *Brett*, after time taken to consider the case, differed in opinion, the Lord Chief Baron being for the affirmance of the judgment of the Exchequer Division, the two Lords Justices being of opinion that it must be reversed (1). It was accordingly reversed, and this appeal was then brought.

Mr. *Mellor*, Q.C., and Mr. *R. T. Reid*, for the Appellant:—

The real question here is as to the effect of Order LV. made under the authority of the Judicature Acts of 1873 and 1875. It is submitted that those statutes and the order made thereon swept away all the multifarious, inconsistent, and contradictory provi-

(1) 2 Ex. D. 349.

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sions and decisions relating to costs, and established one plain and simple rule in their stead. The intention of absolutely repealing many previous laws is strongly marked. The 33rd section of the Act of 1875, sub-sect. 2 (38 & 39 Vict. c. 77), says that "From and after the commencement of this Act there shall be repealed any enactment inconsistent with this Act or the principal Act." The Order LV. was copied from the proceedings in Equity, and was intended to give the Judge who heard the case the power of deciding to whom the costs should be given. That had always been the practice in Equity; it had not been the practice at Law, but the intention of the Judicature Acts to assimilate the rules of practice in all the Courts was on this point positive. In accordance with this intention sect. 25, sub-sect. 11, of the *Judicature Act* of 1873 (36 & 37 Vict. c. 66), enacted that "generally in all matters not hereinbefore particularly mentioned in which there is any conflict or variance between the rules of Equity and the rules of Common Law with reference to the same matter the rules of Equity shall prevail." Nothing could be conceived more inconsistent, contradictory, and unintelligible than the rules at Common Law as to costs. The *Statute of Gloucester* had established one rule—various Acts upon particular matters had introduced such numerous qualifications and variations that it was almost impossible to find one consistent rule, or anything like a principle among them. The Judicature Acts were passed with an intention to put an end to all this confusion, and to establish one clear universal rule of practice. And this had been done by Order LV. The words of that Order were clear and positive. It was plainly drawn after due consideration of all matters, for there was a special provision as to the costs of trustees and mortgagees, as to which it was expressly declared that the course to be pursued was to be "according to the rules hitherto acted upon in Courts of Equity." Then came the proviso that where "any action shall be tried by a jury the costs shall follow the event," but even that was made subject to one restriction, "unless the Judge at the trial, or the Court, shall otherwise order," which again reserved the matter for the discretion of the Court, if the Court should be pleased to exercise such discretion. If no discretion was exercised the old rule of law that the costs should follow the event applied

to the case. Here the Judge had refused to interfere, and therefore the Plaintiff's right rested on the words of the Order that "the costs shall follow the event." That event was in his favour, and he was entitled by law to his costs. It was attempted to be argued on the other side that that must be "the event" as construed by the aid of various statutes which had been passed with relation to costs. But that was the very evil which this Order was made to remedy. For those statutes had led to all sorts of inconsistencies, and even to injustice: *Evans* v. *Rees* (1). The direct purpose of Order LV. was to remedy such an evil. The repeal of all the old law of costs, except the provisions of the *County Court Act*, 1867, which are expressly preserved by the 67th section of the *Judicature Act*, 1873, was intended. That was the view taken of the matter in *Parsons* v. *Tinling* (2), and that had been the view previously suggested in the observations made by Lord Justice *James* soon after the passing of the Act of 1875 (3). If the *Statute of James* is not repealed by this Order, the Order itself is mere waste paper without meaning or effect.

A statute may be repealed by the express words of a subsequent statute, or by necessary implication. If the earlier statute is entirely inconsistent with the provisions of the later one, as the two cannot be enforced together, the former must be repealed, although the latter may not contain any words of direct repeal. The words of the first part of this Order are quite sufficient for this purpose of repeal: "Subject to the provisions of this Act, the costs of all proceedings in the High Court shall be in the discretion of the Court;" they were not so at Common Law, when the Act was passed. Upon the plainest rules of legal construction the old system and the new legislation being incompatible with each other, the former gave way, and the latter came into full operation.

Mr. *Lawrance*, Q.C., and Mr. *Bigham*, for the Respondent:—

The inconsistency between the old law and the new Order is denied. The proviso must be read as part of the Order, and as

(1) 9 C. B. (N.S.) 391; 30 L. J. (C.P.) 16.

(2) 2 C. P. D. 119. See also *Creen* v. *Wright*, Ib. 354.

(3) "Memorandum," 1 Ch. D. 41.

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affecting the whole of it. So read it will be clear that the old rules of the law as to costs and this new Order are not inconsistent with each other. They declare that the costs shall be in the discretion of the Judge if he makes an order or grants a certificate; that was the practice before; but if he makes no order and grants no certificate, the costs shall, in the case of a jury trial, follow the event, and that event is one which has been provided for by statute. It is not the event of the mere verdict, but of the verdict taken in connection with the statutes which declare what shall be the legal effect of that verdict. In this case the Plaintiff would get no more costs than damages, for such had been the declared intention of the Legislature in the Statute of *James*. Where a case is decided without a jury, the Judge, as in Equity, has an entire discretion over the costs; where it is tried by a jury, effect must be given to the verdict, that is, however, such effect as the law has provided shall ensue upon the verdict in the particular case. If the Judge had certified under 3 & 4 Vict. c. 24, s. 2, it would merely have been to remit the Plaintiff to what he might obtain before that statute passed, namely, what was given him by the Statute of *James*. *Evans* v. *Rees* (1) is a decisive authority on that point. And that case had been deliberately adopted and acted on as "directly in point" by the Court of Queen's Bench in *Marshall* v. *Martin* (2). Those cases laid down the rule of law before the passing of the Judicature Acts, and under that rule the Plaintiff would get no more costs than damages. Then came the Judicature Acts. If those Acts and the Order founded on them had the universal effect which the argument on the other side attributed to them, it must prevail in all cases and in all Courts. A case which came before the Court of Appeal in March, 1877, shewed that that was not so. In the case of *The Daioz* (3), a collision took place between two vessels. The Defendant in the Admiralty suit relieved himself from liability by shewing that he had a pilot on board by compulsion of law. Being successful on that defence, he applied for costs. There was a rule of the Court of Admiralty that when a Defendant succeeded on a plea of compulsory pilotage, no costs were to be given. That had been the decision in

(1) 9 C. B. (N.S.) 391; 30 L. J. (C.P.) 16.

(2) Law Rep. 5 Q. B. 239.

(3) 47 L. J. (N.S.) Pr. Div. & Ad. 1.

the case of *The Schwan* (1), and that decision was followed in the case of *The Daioz* (2). That case was taken before the Court of Appeal, and the Master of the Rolls and the Lords Justices *Mellish* and *Baggallay* affirmed the decision. That was a distinct recognition of the fact that a rule of Court existing before the Judicature Acts had still a governing force, not having been, in terms, repealed by those Acts. The same principle must apply here, and the greatest confusion would be introduced if the general words of such an Order could have the very extensive effect now sought to be attributed to them; and *Baker* v. *Oakes* (3) shewed that the words of the Order were to be strictly construed.

The rules of legal construction did not permit them to have such an effect. The old rule is undoubted that a special statute is not repealed by general words in a subsequent statute. Here the Statute of *James* is special, the words of the Order are general, and the old rule of construction applies.

Mr. *Mellor* replied.

LORD HATHERLEY:—

My Lords, the Appellant in this case was the Defendant in an action for slander brought against him by the Respondent, the Plaintiff in the action; and the verdict was obtained by the Plaintiff with damages assessed by the jury at one farthing. The Act 21 Jac. c. 16, s. 6, provides that when a Plaintiff in an action of slander shall not recover more than 40*s*. damages, he shall not have more costs than damages; and the question upon this appeal is, whether or not Order LV. under the *Judicature Act* of 1875, coupled with the 33rd section of that Act, has had the effect of repealing or at least modifying the above enactment of the statute of *James* I. This Order LV., made under the *Judicature Act* of 1875, is contained in the schedule to that Act, and is made a part of the Act, and must be so dealt with. It directs that "the costs of and incident to all proceedings in the High Court" of Judicature established by the Act, "shall be in the discretion of the Court," but "subject to the provisions of the

(1) Law Rep. 4 Ad. & Ec. 187. (2) 47 L. J. (N.S.) Pr. Div. & Ad. 1.
(3) 2 Q. B. D. 171.

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Act." The same Order excepts certain causes which have no relation to the matter now in hand, and also provides that "where any action or issue is tried by a jury the costs shall follow the event," "unless the Judge" who tries the action "shall otherwise order." In the case before us no order has been made by the Judge; and the majority of the learned Judges in the Court of Appeal have held that the Act of *James* I., being an Act directed towards a special and limited object, is not repealed by the general affirmative enactment contained in this Order LV., notwithstanding the 33rd section of the *Judicature Act* of 1875, which repeals certain specified Acts, "and any other enactment inconsistent with this Act and the principal Act."

Now, my Lords, I think that Order LV., when speaking of the costs following the event, must be taken in the first place to mean that he who has succeeded in his cause shall, without regard to the amount of damages which he shall recover, be entitled to his costs unless the Judge shall otherwise order. I say I take that to be the meaning, if we are simply to consider the Order itself, and are not to consider its effect upon the Statute of *James*.

An argument deserving of very great attention appears to have influenced the minds of the majority of the learned Judges in the Court below, an argument derived from a well-known class of authorities, which have determined that an Act directed towards a special object, or special class of objects, will not be repealed by a subsequent general Act embracing in its generality those particular objects, unless some reference be made directly or by necessary inference to the preceding special Act. The law upon this subject is stated in the observations of a text-writer cited by Lord Justice *Bramwell*. But I prefer taking the law as it is laid down by Lord Justice *Turner* in a well-known case, which gave rise to a considerable amount of discussion, that of *Hawkins* v. *Gathercole* (1).

8 App Cas 372

The question there was whether or not the Act of *Elizabeth*, or that clause of it at least which prohibits the charging of benefices, had been repealed by a subsequent Act of a very late date, passed in the reign of the present Queen, with reference to rendering judgments more effectual on behalf of creditors, and which spoke

(1) 6 De G. M. & G. 1. 1 Jur NS. 481

of giving effect to those judgments against various classes of property, enumerating amongst others as a subject-matter of charge under the Act, any "interest in or out of any lands, tenements, rectories, advowsons, tithes, rents, and hereditaments." An attempt was made to charge, under a judgment by virtue of that Act, certain tithes which were in the hands of a clergyman, on the ground that the Statute of *Elizabeth* had been repealed by this statute which gave effect to judgments over (amongst other things) "rectories, advowsons, tithes, rents, and hereditaments," but it was held that it had no such effect. What might have been held if there had been nothing whatever for the statute to operate upon in the shape of tithes, advowsons, and rectories would have been a matter for consideration, but inasmuch as there are lay tithes, and as we know, of course, that advowsons as well as tithes may be in the hands of laymen, it was held that there was enough to answer the purposes of the words used in the Act of *Victoria* relating to judgments, and it was held that the general intent and object of that Act was simply to give a facility of remedy to a judgment creditor, and that it was, in no way, directed to the particular class of persons and objects which are defined in the Statute of *Elizabeth*. Indeed, in the course of the argument it was observed that the *Statute of Frauds* might have been open to the same observation, because there tithes are mentioned in relation to judgments, and it certainly never entered into anybody's mind that the *Statute of Frauds* would have any operation upon the Statute of *Elizabeth*.

Lord Justice *Turner* reviews the whole subject in his judgment, and what he says is this (1): "The principal question which we are called upon in this case to decide is, whether under the provisions of the statute 1 & 2 Vict. c. 110, s. 13, a judgment entered up in any of Her Majesty's Superior Courts at *Westminster* operates as a charge upon an ecclesiastical benefice held by the person against whom the judgment is entered up." Then he shews that it may apply to lay tithes and property of that description in the hands of laymen; and then he says that in construing Acts of Parliament (2) "Regard must also be had to the intent and

(1) *Hawkins* v. *Gathercole*, 6 De G. M. & G. at p. 20.

(2) *Hawkins* v. *Gathercole*, 6 De G. M. & G. at p. 21.

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meaning of the Legislature. The rule upon this subject is well expressed in the case of *Stradling* v. *Morgan* (1), in which case it is said, 'That the Judges of the law in all times past have so far pursued the intent of the makers of statutes, that they have expounded Acts which were general in words to be but particular, where the intent was particular;' and after referring to several cases the report contains the following remarkable passage: 'From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it, and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion.'"

My Lords, the doctrine is laid down there as fully as in the learned text-writer (2) cited by Lord Justice *Bramwell* (3), and the grounds and reasons of it are very well explained and satisfactorily established. This will be found, I think, on looking into and analysing the various cases on the subject, which I do not enter into because it is unnecessary so to do, to be the governing idea and conception, and the conclusion which has been founded upon it by the Courts of Judicature. When an Act of Parliament repeals a preceding Act which relates to a certain definite subject-matter distinctly laid down for the guidance of those who are to be operated upon by the Act of Parliament in that special matter, or to a particular class of persons who are to be either protected, or it may be, affected adversely by a particular clause of the

(1) Plowd. 204

(2) *Maxwell's* Interpretation of Statutes, p. 157.

(3) 2 Ex. D. at p. 351.

enactment, then the Legislature is presumed to have had that very special subject-matter and that very special class of persons in contemplation when the subsequent statute was passed; and if there was a general Act subsequently passed, the generality of which was large enough, as far as words go, to comprehend the particular matter dealt with in the previous enactment, it will be considered whether or not, as regards the persons who are to be affected or protected by the Act, persons who are not in any way mentioned or specified by the subsequent general Act are to be injuriously affected by an adverse enactment, or deprived of a benefit they are entitled to under a previous enactment. And in that case the Court, in construing the subsequent general Act of Parliament, would expect to find something or other pointing out that the attention of the Legislature had been turned towards the former special enactment, and, in passing the general Act, that it had made the new enactment with the view of embracing every case (including that special case) embraced within the provisions of the previous Act.

Now, my Lords, considering the question in that point of view, let us see in the first place what the special Act of *James* did. That Act can hardly be said to have contemplated a special class of persons; it only says that anybody bringing an action of slander who does not recover more damages than 40*s.* shall not recover more costs than damages. It can hardly be said that persons disposed to bring actions for damages for slander, can be held to be a class of persons who are to be struck at on the one hand, or on the other hand to be regarded, and who must be held as not to be within the generality of another Act, which would embrace all classes of persons whatsoever. It is simply a general Act striking generally at all persons who bring this class of action, but they do not form any particular class of the community who are entitled to any special observance, care, or regard in the framing of a subsequent Act.

I think this will be apparent when you come to consider what the object of this Act of *James* was. It was this: in the matter of costs the Common Law Courts had no discretion such as the Courts of Chancery had at all times asserted. The Common Law Courts were obliged to go back to a legislative enactment in order

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to arrive at their power, or rather their duty, for power they had none, of dealing with costs. The *Statute of Gloucester*, which was passed in the 6th Edw. 1, is the foundation of the Common Law jurisdiction as to costs, and that statute bound the Common Law Judges, so that they could not in any way depart from the rule that was laid down, that costs followed the event. Therefore it was necessary to except out of that strict and rigid rule any case which the Legislature might consider worthy of such exception. The Legislature, finding that there was one general sweeping enactment which deprived the Common Law Courts of their discretion, and compelled them to hold in all cases that the costs followed the event, thought that there was a particular case in which there might be an exception made from the hard and fast rule, that costs followed the event, whatever the particular circumstances might be. Now, when the *Judicature Act* was passed, this difficulty was got rid of for ever, once for all, as regards the Common Law Courts. The two jurisdictions were mingled, and the same powers and authorities were given to what were formerly the Common Law Courts,—that is to say, to those who had to try what previously were Common Law actions—the same authority was given to them as had always existed on the part of the Courts of Equity. The Legislature gave its sanction distinctly, as a part of the *Judicature Act* of 1875, to this Order LV. in the schedule. By the *Judicature Act* the Legislature gave a direct authority to all the Judges of the Courts constituted under the *Judicature Act*, and vested in them a discretion which was to guide and determine them, according to the circumstances of each case, in the disposition of costs.

In a general application of one rule as to costs, it will be considered (at all events Parliament so held) reasonable and proper that exceptions should be made, for the express purpose of preventing this otherwise general rule from governing all cases, whatever their circumstances might be. The argument with reference to the withdrawal of any object of a special Act, passed anterior to the general Act, from its operation, entirely fails, when you come to see that it was not a particular class of Her Majesty's subjects who were exempted from the operation of a particular rule, but that a mode was pointed out of administering

justice in certain cases, which mode was rendered necessary by the previous course of legislation, which had laid down a distinct and rigid rule not otherwise capable of being disposed of. When this *Judicature Act of* 1875 came to be passed, it was seen that it was no longer necessary that any such special exemption should be provided, because in every class of suit, whatever might be the character of the action, or the position of the parties, there was a power left to the Judge in his absolute discretion (meaning of course his judicial discretion) to determine this question of costs. The case of a trial before a jury is no doubt, by Order LV., exempted in the first instance from the discretionary power of the Judge. The Judges who had the power to make the Order and to give to it the authority and effect of an Act of Parliament, laid down as the primary rule to guide those who should have to act upon it hereafter, that, as a general rule, the costs should follow the event in jury trials, but even in that case they did not deprive the Judge of his discretion, for they added the words, "unless the Judge shall otherwise order."

Let us now see what would be the effect if we did not hold that this Order, together with the *Judicature Act*, superseded the special enactment of *James* on the subject of actions of slander. The effect would be this, you would have outstanding an absolute rule applying to a particular class of cases, actions of slander, as hard and fast, that the Judges should not award the costs, as it had been before that they should award them, although you have a subsequent Act of Parliament intended, as it seems to me, to render the course of procedure in the new Courts about to be established under the Act, analogous to that which had from all time been the practice of the Court of Chancery. Foreseeing that the Judges would have full power to make rules as to costs under the 17th section of the Act in future, which, indeed, they have made in the present case, and that full power as to costs, in reference to all subjects which were formerly subjects of Common Law jurisdiction, would be placed in the hands of the Judge, and that he might, at his discretion, entirely supersede the operation of that rule in the Common Law Courts, they seem to me, in reference to that object, and many other objects contained in the Order, to have provided that this difficulty arising from clashing with other

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Acts of the Legislature should be entirely overcome. They provide for that by the 33rd section of the *Judicature Act of* 1875, which expressly enacts that "From and after the commencement of this Act there shall be repealed the Acts specified in the second schedule to this Act," and also "Any other enactment inconsistent with this Act or the principal Act." Now, my Lords, any order whatever as to costs made as the Judges have power to make an order under the 17th section, made as is provided for in the Act of Parliament itself, would, if you were not to construe this Act as repealing previous Acts with reference to costs, down to the last Act passed relating to special costs, bristle with inconsistencies. Any Act giving discretion to the Court must be inconsistent with any special Act not repealed by this 33rd section; and any regulation whatever that was made relating to costs would teem with insuperable difficulties if we were not to hold that all those previous Acts, which defeated this intention of the Legislature with regard to costs, were repealed by the 33rd section.

My Lords, I do not rely much upon the 67th section of the *Judicature Act of* 1873, with reference to costs in proceedings in the County Courts. That was relied upon somewhat by some of the learned counsel as shewing that where there was an intention to except a certain class of costs that class of costs was specified. The rule was relied upon that the *expressio unius* implies the *exclusio alterius*. I do not rely upon that section; I do not think it is necessary to do so; but what I do rely upon in this case is, that this enactment of *James* was not made in regard to any definite portion of property, or any definite class of persons, but that it was made as a particular exception from a general rule laid down by a previous statute; that that previous statute must be altogether abrogated by the necessity of the case by the Act of 1875; and that in order to meet the power given to the Judges, that of having an absolute discretion with regard to costs, it is necessary that every portion of the Act of Parliament inconsistent with that general discretion should be swept away, unless there be some local or special wrong which we have not yet heard of, in any part of the Act, in the case which has been argued before us. Except in that way it must be intended that the full discretion given to the Judges of allowing costs should be upheld notwithstanding

any enactment inconsistent with it, and any enactment inconsistent with it must be taken to be abrogated.

My Lords, I have not said a word, it will be observed, and I shall not do so, upon a point which was much dwelt upon by the learned Lord Justice *Bramwell*, to whose opinion I attach great weight, with reference to other Acts of Parliament relating to costs. There is a series of Acts referred to by the learned Justice, which in special cases give what are called double or treble costs. I can conceive many circumstances which might make a difference between those cases and this which is now before the House. What I see is that the Court of Chancery, always having had this jurisdiction with regard to costs, and the Courts of Common Law never having had it since the 6th of *Edward* I., there being an intention on the part of the Legislature that in all cases before the High Court, whether Common Law or Equity, there should be one common course of procedure, the intention being that the Orders and Rules made on that subject should be sanctioned by that Act, everything inconsistent with them must be considered as being done away with by the operation of the 33rd section. The Court of Chancery always had the power to regulate costs, and the Court of Chancery, in dealing with costs, might give costs as between party and party, which we know are far from indemnifying a successful suitor; or, (as in many cases I have known it done,) the Court of Chancery might reduce the costs. The Court might say that £50 should be paid for the costs, whatever they might be, or any other particular sum, always, of course, below the full costs as between solicitor and client; the Court had no power to increase the costs beyond that. Therefore, with respect to those enactments as to double costs, and treble costs, and the like, I think the argument need not be pursued, and I will not delay your Lordships by so doing; but it will easily be perceived that they relate to quite a different subject-matter from that in which the discretion is to be absolute. Those costs are really penal; the costs to be paid by the parties in a case of this kind are measured by the amount of damages. I say that there may be a different argument founded upon that, but I am not assenting to, or dissenting from, that argument. It is enough for me to say—and I confine my observations entirely to that question—that this par-

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ticular statute of *James* has been operated upon by the *Judicature Act*, so as to make it inapplicable to the present case.

Under these circumstances, my Lords, I propose to your Lordships to reverse the decision of the Court below, and to direct that the Appellant should have his costs in the proceedings in the Court below and his costs in this appeal.

LORD O'HAGAN:—

My Lords, I also am of opinion that the judgment of the Court of Appeal should be reversed.

Formerly, the rule as to costs was different in Courts of Common Law and Courts of Equity. In the latter they were in the discretion of the Judge; in the former, with some statutable exceptions, they followed the event, and the successful party took them as of course. The statutes making the exceptions were difficult of construction, and not always capable of satisfactory reconcilement with each other, and I well remember how often they embarrassed counsel and puzzled Judges, and how great was the conflict of decision upon them, whilst I practised at the Bar and sat upon the bench in a Court of Common Law.

The purpose of the *Judicature Act* was to establish one great tribunal, with consistent and homogeneous action in all its parts, and, as far as possible, an assimilation of practice and procedure. The matter of costs was one of the most important with which the Legislature had to deal in carrying out this purpose: and, in entire harmony with it, the Order we are considering, which has the full force of law, declares that "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." The operation of that rule is as large as words can make it, and it was apparently designed to extend to all proceedings the discretionary power which had before governed only those in Equity. It is expressly qualified as to mortgagees and trustees, and by the proviso with which we have to deal, that on a trial by jury "the costs shall follow the event," unless the Judge shall determine otherwise.

Now, in the first place, assuming the law to be that mere general words do not repeal special provisions, unless there is a plain inconsistency between them, I am of opinion that there is here

such an inconsistency. An enactment that, in a particular instance, a successful suitor shall have no more costs than damages, and an enactment that "in all proceedings" the Judge may give him such costs as in his discretion he deem right, seem to me irreconcilable; and if they are, the latter enactment must prevail, substituting the wide discretion for the peremptory rule.

And why should we strain to discover another and a narrower construction when we consider that the general object of the statute was to work an assimilation, which such a construction would *pro tanto* forbid; and when we find the Legislature declaring that, in the event of a conflict between the rules of Law and Equity, the rules of Equity shall have the preference? The continuing operation of the statute of *James* would confessedly limit the discretionary action of the Judge, which Equity maintained: and why should we labour to find reasons for that limitation in opposition to the declared policy of the statute, and in spite of the substantial inconsistency between the old law and the new?

If this rule had terminated without the proviso, I do not think that the universal discretion of the Judge, save in the specially excepted cases, could reasonably have been denied; and I do not see in the subsequent words anything to abridge it, so as to work a revival of the Act of *James* I. The direction that "the costs shall follow the event" would, in ordinary understanding, point to the success or failure of the parties to the suit respectively as determining the right, or the liability, not to a portion but to the whole of the costs of the cause. And if I am right in holding that the inconsistency between the preceding clause of the rule and the statute is such as to overbear and nullify the latter, "the costs," after the passing of the *Judicature Act*, can mean nothing but the general costs unaffected by the special legislation which has, in that view, altogether ceased to have effect. I repeat that I do not understand why we should exert legal ingenuity to give to the words "the costs shall follow the event" an interpretation not attached to them by ordinary usage, and also inconsistent with the principle and policy of the statute in which they are found. The statute aims at uniformity of practice "in all proceedings in the High Court." The suggested interpretation would continue the

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diversity between them. The statute contemplates a preference to the rules established in Equity, the interpretation would involve the continuance of a law directly in antagonism with those rules. If we can fairly avoid these consequences and reconcile the plain objects of the *Judicature Act* with a reasonable construction of the rule we ought to do so. And I think we may accomplish this by adhering to the common meaning of the words, and holding that the costs to "follow the event" are the ordinary costs incidental to success in an action.

The Legislature has chosen, in the case of the verdict of a jury, not to take away the general discretion of the Judge, but to leave it to himself to say whether he thinks proper to exercise that discretion or allow the verdict to work its own result as to costs in giving them to the successful party. It presumes in favour of the verdict that the costs should follow, unless the Judge intervenes to regulate them; but I note in this, no indication of a design to re-establish the exceptional law which was, in my judgment, intended to be done away with by the antecedent words of the rule. I cannot entirely refuse to say, with the Lord Chief Baron, that in one view of the matter the proviso might not be held to bear the construction put upon it by the Respondent as to the effect of the event of the trial; but at the most, in that regard, the matter is equivocal. There are two interpretations either of which might possibly be entertained; the one recognising the existence of the antecedent statutes, the other regarding them as repealed, and I prefer the latter as, in my mind, manifestly accordant with the general intention of the Act, and calculated to attain the benefit at which it aimed, and to rectify the mischief it sought to remedy.

As to the argument derived from the repeal of a number of other statutes, as well as that immediately in question, which may be consequential on a decision in the Appellant's favour, I think it scarcely legitimate, if there be any force in the considerations on which I have relied. If it was the purpose of Parliament to simplify our legal system and unify it as far as possible, and for this purpose, *inter alia*, to give to the Court, universally, the discretion as to costs it had theretofore exercised in equitable proceedings, and if the phraseology of the statute is strong and clear to

carry out that purpose, I do not think we are at liberty to baulk the purpose, because the effect may be to work the repeal of statutes we may deem beneficial. We have no means of knowing how far such a result was accidental or designed—we cannot tell whether the view we may take as to those other statutes would or would not have been adopted, if the question of their abolition had been expressly raised; and whatever we may think about them, if the necessary consequence of the legislation of 1873 involves their repeal, we cannot help it.

I give no opinion as to its effect on other Acts which are not before us. Different considerations may apply to them with different results, and each must be dealt with accordingly, as the occasion arises. But even if the view of the eminent Judges of Appeal should be correct as to the consequential repeal of the statutes to which they refer, I do not conceive that the Respondent ought therefore to succeed. The Legislature may have unconsciously done a thing deemed injurious. It may have acted with improvidence or without sufficient forethought; but if so, it must be left to correct its own error, and we have no power to defeat its plain intention because of the results which it may or may not have contemplated.

I do not, therefore, feel the force of the argument which was so much relied on in the Court of Appeal; but whatever its force may be, I think it is counterbalanced and overborne by the special exclusion of the County Courts from the general operation of the Act as to costs. That exclusion shews that the attention of Parliament was called to the propriety of limiting the discretion of the Judge in particular circumstances; and the omission to limit it in those with which we have to deal persuasively suggests that the limitation was not designed to affect them. As was observed by Mr. Justice *Grove,* in *Parsons* v. *Tinling* (1), a very few words would have secured the continuing action of the earlier statutes; but they were not inserted, and their non-insertion derives double significance from the careful reference to the County Courts.

For these reasons I am of opinion that the proposal of my noble and learned friend should be adopted by your Lordships. It seems to me to be warranted by the terms of the Order and the provisions

(1) 2 C. P. D. at p. 124.

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of the statute, by carrying out the policy of the Judicature Act to remove the reproach which has been brought upon the law by so many astute arguments, and so many conflicting decisions.

LORD BLACKBURN :—

My Lords, I also have come (although not without some hesitation and doubt at first) to the conclusion that the decision of the Court of Appeal was wrong, and that it ought to be reversed.

I think that the ground upon which their Lordships went, which is in itself a good ground to apply to proper cases, has been misapplied in the present case, and I will give my reasons presently for entertaining that opinion.

First of all I will observe that before the Judicature Acts came into operation there was a rule as to costs in Courts of Common Law; costs in Equity we are not concerned about. Costs in Courts of Common Law were not by Common Law at all, they were entirely and absolutely creatures of statute. There had been statutes passed at different times giving costs, some in one case and some in another, the earliest being the *Statute of Gloucester*, passed many centuries ago, which gave costs, if I recollect rightly, to demandants who recovered damages in a real action, which they had not had before. Subsequent statutes were passed at different times giving a Plaintiff a right to recover costs in any action, and there were other statutes passed at different times upon the subject of costs in the Common Law Courts. I think the first that gave costs to the Defendant was as late as *James* I., and there were several other statutes giving costs, but all those statutes went upon one principle throughout. The result was, that, as a general rule, in every case in Courts of Common Law the party who succeeded got his costs, whether he was Plaintiff or Defendant, whether he succeeded by a verdict or upon demurrer. I say the general rule established by all those numerous statutes (for there was no one statute which laid it down) was that the successful party got his ordinary taxed costs; in other words, that the costs followed the event, and that the party who was successful had them as a matter of right.

From that general rule, however, certain statutes made several exceptions in particular cases. Of the three statutes which come

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into question in the present case the first is the statute 21 Jac. 1, c. 16, s. 6. The effect of that statute was to make an exception from the general rule which I have stated, and to say that where a party had obtained a verdict and recovered damages less than 40*s.* in an action of slander, he should have no more costs than damages. There was no power to certify or to do anything of the kind. It was an inexorable rule that when he recovered less than 40*s.* in that particular action he was to have costs no doubt, but those costs were to be no more than the damages. That Act was obviously passed to discourage frivolous actions of slander. If that statute is still in force and has not been repealed, the Plaintiff in the present case would be entitled as a matter of right to a farthing costs, and could not in any way have got more.

Besides that, my Lords, two other statutes were passed for an object very little different, which it is necessary for me to notice. One of those is the 3 & 4 Vict. c. 24, what is commonly called *Lord Denman's Act*, which says that in actions of tort generally, when a party recovers less than 40*s.* he shall have no costs at all, unless there be a certificate or order of a particular sort. That statute would also be applicable to this action, if it has not been repealed; and as the Plaintiff has obtained no certificate, that would prevent his getting even a farthing costs.

There is another statute which I must mention, namely, the 30 & 31 Vict. c. 142, the *County Courts Act*. That is an Act passed for the purpose of discouraging persons suing in the Superior Courts instead of suing in the County Courts, and there is an enactment in general terms that, where a party recovers less than a specified sum in tort he shall have no costs at all, unless some particular certificates are given. Although that was a County Courts Act, and the general intention of the Legislature obviously was only to discourage the bringing of actions in a superior Court which might have been brought in an inferior Court, yet as the words were general, that enactment was originally construed to mean this: that when a Plaintiff recovered in an action of slander less than a specific amount, although an action of slander could not be brought in a County Court, nevertheless he should not, if the damages were below 40*s.*, get even his farthing, or if they were above 40*s.* (when the statute of *James* would not apply) he should

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not get his taxed costs unless he had a certificate. That, also, would have stood in the way of the present Plaintiff, inasmuch as he has no certificate at all. If that statute stood, the Plaintiff would not get even his farthing.

The question which arises in the present case is, Are those three statutes got rid of under the *Judicature Act?* Now, in order to ascertain that, we have to construe that Act and see what it means. There is first of all the *Judicature Act* of 1873—the principal Act—and in that Act there is a section 67 which affects the provision in the last-mentioned *County Courts Act*—I shall have to make a remark upon that afterwards. The Act of 1875 provided, in the 16th section, that the orders contained in the schedule should be considered part of the Act, subject to all provisions to be made hereafter; and it did make them part of the Act, and the Orders contained in that schedule are as much part of the Act, and of the will of the Legislature in the passing of the Act, as any section in the Act itself. It is upon the construction of that Order LV. that this question will mainly depend.

The Order begins "Subject to the provisions of the Act." The only provision in the Act which I think it is necessary to consider is that sect. 67 of the Act of 1873 which I have already mentioned, and which I shall refer to afterwards. Then the Order goes on to say, "the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court." Then follows a provision as to some costs in Equity which I need not care about. Then there is this proviso, "Provided that where any action or issue is tried by a jury, the costs shall follow the event, unless upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order." With regard to the meaning of that proviso I observe that in the judgment of the Court below the Judges say that they do not understand that proviso. Now, whether the proviso is wise or not wise, whether it was a judicious thing to put it in or not, was for the Legislature to consider; but it seems to me that its meaning is plain. The general enactment is that costs shall be in the discretion of the Court—that proviso says, that when an action is tried by a jury it is to be a different thing. If the Plaintiff recovers when the action is tried before a Judge alone, the costs are not to be

recovered absolutely, but are to be at the discretion of the Judge; if he recovers when the action is tried before a jury there is to be a different rule—"the costs shall follow the event"—that means that the successful party, whether Plaintiff or Defendant, shall have his costs (which would clearly in my opinion mean his ordinary taxed costs), unless "upon application made at the trial for good cause shewn," an order shall have been made otherwise. It is not at all necessary to inquire what would justify such an order, and what is meant by "good cause shewn," or the like, for in this case no order has been made, and it may be either one way or the other.

Therefore it remains entirely for us to say, upon the construction of that Order, whether or no this has the effect of getting rid of the three enactments which I have before mentioned, which would certainly have stood in the way of the Plaintiff in the present case recovering any costs at all. Upon that the question arises I think upon the construction of the Act. I need only mention one other section in the Act upon which something has been said. The Act by the 33rd section provides that a number of Acts named in the schedule shall be repealed, and if it had stopped there and done nothing more, there might have been an argument of this kind. Inasmuch as there are certain statutes enumerated which are repealed, *expressio unius est exclusio alterius*, and accordingly those statutes and those alone are repealed; and inasmuch as the statute of *James* is not one of the enumerated statutes it would under that argument stand. But that is entirely obviated by what immediately follows. It says there shall be repealed also all statutes "inconsistent with this Act." That brings us to say, Is this statute of *James* inconsistent with the Act or not?

Now, my Lords, an Act saying that all statutes inconsistent with itself shall be repealed, really goes no farther than the general law, but it becomes a question, upon which there is a vast quantity of authority in different ways, as to what shall be the inconsistency which shall cause the repeal of an earlier statute or an existing general rule. I do not know that it is better stated anywhere than in *Foster's Case* (1), where it is said, "This Act of 35 Eliz. is all in the affirmative, and therefore shall not repeal or abrogate

(1) 11 Co. Rep. 62 b.

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a precedent affirmative law before; and the said rule that *leges posteriores priores contrarias abrogant,* was well agreed; but as to this purpose, *contrarium est multiplex.*" And then he proceeds to give five instances I think of different rules where he says that there may be a contrariety shewn in the statute, and he ends by saying what I have quoted. He, besides, refers to *Plowden's* Commentaries in *Amy Townsend's Case* (1), and I may refer also to *Plowden's* Commentaries, where, in two places, anybody who wishes to find an argument on either side about the repeal of a statute for inconsistency with a subsequent statute, will find many good and ingenious arguments, and he can pick out the arguments which make for the side he particularly wants to support. Not content with that Lord *Coke* goes on to say, "and many other contrarieties there are, which are not necessary to be recited."

I shall not attempt to do what Lord *Coke* has not done. I shall not attempt to recite all the contrarieties which make one statute inconsistent with another; the *contraria* which make the second statute repeal the first. But there is one rule, a rule of common sense, which is found constantly laid down in these authorities to which I have referred, namely, that when the new enactment is couched in general affirmative language and the previous law, whether a law of custom or not, can well stand with it, for the language used is all in the affirmative, there is nothing to say that the previous law shall be repealed, and therefore the old and the new laws may stand together. There the general affirmative words used in the new law would not of themselves repeal the old. But when the new affirmative words are, as was said in *Stradling* v. *Morgan* (2), such as by their necessity to import a contradiction, that is to say, where one can see that it must have been intended that the two should be in conflict, the two could not stand together; the second repeals the first.

Now, applying that to the present case, I think there could not be any reasonable doubt that a law which says that costs generally shall be in the discretion of the Court, and that costs, where a matter has been determined by a jury, shall follow the event, subject to being taken away if certain things happen, are absolutely inconsistent with statutes which say that the successful

(1) Plowd. 112. (2) Plowd. 206.

party shall as a matter of right have his costs. You cannot let the two laws stand together, and say that the costs shall be in the discretion of the Court, and at the same time say that one of the parties shall have them as a matter of right; it is impossible. Neither can you say that the costs shall follow the event, that is belong to the party who succeeds, unless the Court takes them away, and at the same time let a law stand which says that a party shall not have the ordinary taxed costs, but shall only get a farthing. The two are absolutely inconsistent; the one repeals the other.

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Nor should I entertain any doubt of that for a moment, but that that there is another rule which has been laid down, which, I think, is a good rule if it is properly applied, namely, that where there has been a particular rule established either by custom or by statute, where there is some particular law standing, and a subsequent enactment has general words which would repeal that particular law or particular custom, if they were taken in all their generality, yet nevertheless the first particular law is not to be repealed unless there is a sufficient indication of intention to repeal it. It is not to be repealed by mere general words; the two may stand together; the first, the particular law, standing as an exceptional proviso upon the general law. The contention here is, and the ground upon which the learned Judges below went was, that in this case this particular enactment of *James* I. was a particular law within the meaning of this rule; and that it will stand together with the general words in the *Judicature Act*, on the grounds, as Lord Justice *Bramwell* states, that the law laid down by the statute of *James* is a special exception, and that the object of the Order is not to repeal such special laws, but to provide a general law in lieu of the general law which existed before. It is upon that ground that the Judges in the Court of Appeal base their judgment reversing that of the Exchequer Division; and during the argument I was rather impressed with the belief that that ground was sound, and that it was properly applied; but I think on consideration, and after looking into the cases which have been referred to, that, although that doctrine itself was sound, yet it was misapplied to this case; and I will proceed to state why.

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That general rule which I have spoken of was laid down although it was not acted upon in *Blaine* v. *Leighton*, but it has also been acted upon in numerous cases. I may refer to *Trudgin's Case* (1); what was held in that case was this—the Statute *De Donis conditionalibus* said that tenants in fee tail should forfeit their life interest and no more—the rights of the heirs were preserved—then came a statute which said in general words where there was a *præmunire* the owner in fee should always forfeit the fee simple; it was held that the particular law in favour of tenants in tail was not intended to be repealed by those general words of the subsequent statute. In *Rex* v. *Pugh* (2) there was a custom of the hundred of *Battle* that those who served as jurors in the hundred should not serve as jurors of the county. Then came an Act of Parliament, the general words of which enacted that all persons should serve as jurors of the county. It was held by Lord *Mansfield* that the custom of the liberty stood, upon the very ground that it was a special and particular law. Then again in the case of *Hawkins* v. *Gathercole* (3), which has already been referred to by my noble and learned friend now on the woolsack, it was held in the same way that a general Act saying in general terms that the sheriff should seize tithes, did not repeal the Acts which had been passed for the protection of ecclesiastical bodies, saying that ecclesiastical tithes should not be seized but should continue appropriated to the Church. That again was an instance of the application of the rule, and *Fitzgerald* v. *Champneys* (4) was another case.

In all these cases, however, the particular statute relied upon was a statute in favour of a particular class of persons or the property of a particular class of persons. I do not take upon myself to say that all cases in which that rule has been applied have been such, although I am not aware of any case in which it has been applied to which that remark would not be applicable. But where that is the case, where the particular enactment is particular in the sense that it protects the rights, the property, the privileges of particular persons or a class of persons, the reason for the rule which has been acted upon is exceedingly plain and

(1) 11 Co. Rep. 63; Co. Lit. 130 a.
(2) Doug. 188–191.
(3) 6 De G. M. & G. 1; 7 Jur. N.S. 481.
(4) 2 J. & H. 30; 31 L. J. (Ch.) 777. 7 Jur. N.S. 1066.

strong. It would be very unjust, or I would rather say unfair (I do not go farther than that), to pass an enactment taking away from a particular person or class of persons his or their rights without hearing what he or they have got to say about it; and if general words were to have the effect of taking away the rights of a particular person or class which had been given to them beforehand, it would be done without their having any knowledge or opportunity of resisting it, and it is not to be imputed to the Legislature or to be supposed that the Legislature would do what was unfair. Therefore, I think that where only general words are used there is a strong presumption that the Legislature did not intend to take away a particular privilege, right, or property, of a particular class, unless they have done something to shew that. If they have done something in such a way as would shew that that was their intention, if they have said in negative words that those rights or privileges shall all be taken away any enactment to the contrary notwithstanding, that would prevent the presumption arising at all. But in the absence of that, I think it is an intelligible principle to say that the Legislature shall not be presumed to have done anything unfair, and to have taken away this particular privilege, not having stated openly that they meant to take it away, or in such open or clear language that the persons affected might come and resist and use arguments to shew why it should not be taken away, but having simply used general words quite consistent with their never having thought of this privilege at all. I think, my Lords, that that principle will reconcile almost all the cases; certainly it will reconcile all I have cited, and it is a good and intelligible principle.

But when you come to apply it to the present case, I do not think it applies at all. The Statute of *James* and the other two statutes I have mentioned were not passed in favour of a particular class of persons at all. Every one of Her Majesty's subjects is just as much likely to be sued by a roguish attorney and to be interested in the question of costs as another; and when the Statute of *James* said, We will discourage actions of slander by saying that a Plaintiff who recovers less than 40*s.* shall have no more costs than damages; the Legislature was not giving a privilege to a particular class, it was passing a general enactment for the benefit

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of all His Majesty's liege subjects. And to *Lord Denman's Act*, the *County Courts Act*, which I mentioned before, exactly the same remark applies. No particular classes of persons are more likely than others, to be sued in Superior Courts when they ought to be sued in Inferior Courts. Those were general enactments for the benefit of all Her Majesty's subjects, and therefore they do not come within the principle, which seems to me to be a good principle. That it should be taken that the object of the Legislature is not, by mere general words, to repeal special laws, is a perfectly true, good, and sound canon of construction, and if this was a case of special laws giving a privilege, or a property, or a right, to a particular class, the canon would be applicable, but it is not applicable when that special law affected every one of Her Majesty's subjects, just in the same way as the general Statute of *Gloucester*, giving costs to all persons who were Plaintiffs who recovered damages in a real action, applied to all His Majesty's subjects, and not to any particular class. I think, therefore, that the reason of the rule does not apply in this case.

I only wish to add one word more. Like my noble and learned friend now on the woolsack, I wish to guard myself against being supposed to decide as to the effect of this rule upon other statutes which have been mentioned, or its applicability to them. For instance, *Jervis's Act* contains certain provisions in favour of justices against whom actions might be brought maliciously, and gives them greater costs than there would be in other cases. Again there is the *Dramatic Copyright Act* of the 3 & 4 Will. 4, in which double and treble costs are given to the owners of dramatic copyright which is infringed. It may be said, I do not say whether it is true or not, but it may be said, that in these cases and in many others which might be mentioned there is a particular class, and the rule would apply to them. If that rule is a good rule, it must, like every other general rule of construction, yield where there is enough to shew that the intention was to overrule or repeal it. I see that in *Maxwell* (1) it is said that that must be by express words. I do not think that that is so. I think the intention to do it must be apparent, but I do not think it is necessary that it must be by express words. However, I wish

(1) On the Interpretation of Statutes, p. 157.

to guard myself from being supposed to express an opinion, one way or the other, upon what would be the effect of Order LV. upon such a class of enactments. I am confining what I am now saying to the three Acts I have mentioned, the Statute of *James* and the two Statutes of *Victoria* which I have particularly referred to.

Now, my Lords, one word as to section 67 of the Act of 1873. This General Order is made "Subject to the provisions of the Act," and section 67 of the *Judicature Act* of 1873 is of course a provision of that Act. Now that section 67 is curiously worded, it enacts that, "The provisions contained in the 5th, 7th, 8th, and 10th sections of the *County Courts Acts*, 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court." I have already said that the provisions of the 5th section of that *County Courts Act* have been construed to extend not only to cases in which relief could be given in a County Court, but also to cases in which relief could not be given there, for instance, cases of slander. In this enactment of the *Judicature Act*, where the Legislature was giving a greatly extended jurisdiction to County Courts, enabling them to deal with equitable suits and a variety of other things which they had not previously dealt with, it was thought well to say, These clauses shall extend not only to the 5th section which we are now considering, but also to the 7th, 8th, and 10th—they shall extend to all cases in which a County Court has jurisdiction, that is to say, in which relief could be given in a County Court; they shall extend both to an Equity suit and to a Common Law suit. That enactment, therefore, does not touch the cases in which a County Court cannot give relief; and still, notwithstanding all that has been done, a County Court cannot entertain an action of slander. Before this Order of 1875 was made, a party who brought an action of slander would have failed under the Statute of *James* to get more than his farthing, and would have failed also to get even a farthing, because the *County Courts Act* would have applied, and would have prevented his getting even that farthing, but he would not have failed on account of the 67th section of the Act of 1873, for it did not apply to an action of slander. For that reason it seems to me that

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inasmuch as an action of slander is not within the 67th section, it is not at all within the provisions to which the Order of 1875 was to be subject. It may seem a little subtle, but I believe that the reason will be found to be a correct exposition of why that Act does not apply.

I do not think it necessary, my Lords, to say more, but having felt inclined at first to entertain the opinion that the majority of the Court of Appeal was right, and having only changed my mind after looking into the cases, and for the reasons which (I fear at some length) I have now stated to your Lordships, I need hardly say that I am very far indeed from expressing any opinion that the judgment of the majority of the Court of Appeal was clearly wrong; on the contrary, for some time I thought it was right, and I only, after some consideration, have come to the conclusion that it is wrong, and ought to be reversed; but, having come to that conclusion, I must agree in the motion which has been made by my noble and learned friend.

LORD GORDON:—

My Lords, I entirely concur in the opinions stated by your Lordships, and the reasons for reversing the decision of the Court of Appeal have been so fully expressed by your Lordships that I consider it would be a waste of time for me to express them again. I may say, however, that at first I was inclined to regard the judgment of the majority of the Court of Appeal as right; looking at it with the respect to which the opinions of the learned Judges who formed the majority are so well entitled in this or in other Court, I was inclined to agree with them. But, after full consideration, I have come to agree in the judgment which has been proposed by my noble and learned friend Lord *Hatherley*. I do not think it necessary to go over the details of the case, for they have been so fully canvassed by your Lordships that I do not think I can add to the weight due to those opinions. Therefore I simply content myself with saying, that after full consideration and especially having regard to the 33rd section of the *Judicature Act* of 1875, it appears to me that there is really to be found there a repeal of the Act of *James* I. and of the two other Acts which have been referred to in the course of the discussion in this case.

I think that the provision of Order LV. is inconsistent with these statutes, and therefore they are repealed.

LORD HATHERLEY:—

My Lords, on the point of costs I ought to mention to your Lordships that I did not observe that the order of the 3rd of May, 1877, was upon an application with reference to the taxation of costs, and that that order reserves the costs of the litigation for the Court of Appeal. Therefore those costs ought to be dealt with in the same manner as the costs in the Court of Appeal, and consequently the Court of Appeal having ordered the Appellant to pay to the present Respondent the costs of that hearing, if he has had those costs paid to him he ought to repay them. Therefore what I shall propose to your Lordships is to reverse the order of the 2nd of June, 1877, and to direct the Respondent to pay to the Appellant the following costs:—the costs of the appeal in the Court below, including the costs (if any) paid by the Appellant to the Respondent under the order now reversed, and the costs of the Appellant reserved in the order of the 3rd of May, 1877, to be subject to the decision of the Court of Appeal.

Order of the 2nd of June, 1877, reversed; Respondent ordered to pay to the Appellant the following costs:—1. The costs of the appeal in the Court below, including the costs (if any) paid by the Appellant to the Respondent under the order now reversed. 2. The costs of the Appellant reserved by the order of the 3rd of May, 1877, to be subject to the decision of the Court of Appeal; 3. The costs of the appeal to this House. The cause remitted to the Exchequer Division.

Lords' Journals, 6th June, 1878.

Solicitor for the Appellant: *Charles Butcher.*
Solicitors for the Respondent: *Stevens & Co.*

[HOUSE OF LORDS.]

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JOHN WILLIAM CUNNINGHAM AND ANOTHER . . . . . } APPELLANTS;

AND

GEORGE OCTAVIUS FOOT AND ANOTHER . RESPONDENTS.

Will—Charge—Express Trust.

4 Eff Cas 55

J. F. made a will in 1818 in which he said, "I leave and bequeath all my estate and property, real, freehold, and personal of every kind, save and except such parts thereof as are hereby otherwise specifically devised," to *Shaw* and *Franks*, "upon trust for the several uses, intents, and purposes hereinafter mentioned"; he then gave an annuity to his wife during her viduity payable out of the profits of his business, and out of all profits of every part of his estate and property, and directed his three eldest sons *L.*, *J.*, and *S.* to manage his business (at that time a very profitable one); he left specific legacies to his other children; he bequeathed to *L.*, *J.*, and *S.* all the property of every sort then employed by him in carrying on his business; then directed a sale of a certain estate and the investment of the produce thereof to accumulate until all the provisions of his will were carried into effect, and then to go to *L.*, *J.*, and *S.* After other specific bequests the will went on, "Whereas I am possessed of grounds in the county of *Carlow* called *Seskin Ryan*," and of the ground rent of houses in *Sackville Street*, and he directed that the rents, &c., of *Seskin Ryan* should be paid to his wife for her life, "and after her death I give the said lands of *Seskin Ryan* to my eldest son *L.*, his heirs and assigns," and the ground rents "to *J.* and *S.*, their heirs and assigns;" and he directed that "all said bequests shall stand and hold good to *L.*, *J.*, and *S.* only on condition of well and truly paying the several legacies herein directed, and discharging with fidelity the different trusts of this will committed to them." The testator died in 1824. The business fell off, the payment of the annuity was not kept up, but considerable arrears accrued; the last payment of any sort was made in 1862. The widow died in 1865, and by her will bequeathed all her property (including the arrears of the annuity) to her youngest daughter, who died in October, 1873, without having received any portion of the arrears. *L.*, who, on his mother's death, had entered into possession of *Seskin Ryan*, died in January, 1873, and the administrators of the youngest daughter filed their bill in July, 1875, against his representatives to recover the arrears of the annuity out of the lands of *Seskin Ryan*, which they insisted were held subject to a trust for satisfaction of the annuity:—

Held, that the words of the will did not create a trust with regard to the

lands of *Seskin Ryan*, for the payment of the annuity, and that the claim to the arrears was therefore barred by 3 & 4 Will. 4, c. 27, s. 42.

Quære, whether the word "legacies," as used in this will, would include the annuity.

THIS was an appeal against a decree of the Master of the Rolls in *Ireland* (1).

Jeffrey Foot (the well-known tobacco and snuff merchant of *Dublin*) executed on the 31st of December, 1790, a settlement upon his marriage by which certain property in *Dublin* was covenanted to be conveyed to the trustees for the life of the said *Jeffrey Foot*, and after his death the income thereof for *Elinor*, his wife, for her life in lieu of dower, and on her decease to the use of himself, his heirs and assigns; and the trustees were to stand possessed of certain personal estate for the purpose of purchasing real estate, to hold the same upon the like trusts as the real estate before limited. Several children were the issue of this marriage, *Lundy Foot* (who afterwards became the Reverend), *James*, *Simon*, *Frederick*, *Jeffrey*, *William*, *Letitia*, *Catherine*, *Louisa*, and *Cecilia Eleanor*.

After the execution of the settlement, the trustees lent, of the trust money, to *Jeffrey Foot*, the husband, sums of £2000 and £3000, to secure repayment of which he, by a deed of mortgage dated on the 7th of February, 1800, assigned the lands of *Seskin Ryan*, in the county of *Carlow*, subject to redemption on the payment of £5000 and interest. These lands were held under a lease, the interest in which was absolutely vested in *Jeffrey Foot*, the husband, at the date of that mortgage.

On the 25th of July, 1819, *Jeffrey Foot* made his will, in which he said: "I direct the payment of my just debts and funeral expenses out of my personal property, with all convenient speed after my burial (save and except a mortgage for £5000 made by me of the lands of *Seskin Ryan* to the trustees in my marriage settlement for the uses therein), and after payment thereof, I leave and bequeath all my estate and property, real, freehold, and personal of every kind, save and except such parts thereof as are hereby otherwise specifically devised" unto *P. Shaw* and *M. Franks*, Esquires, who were specially described, their heirs, &c.,

(1) Ir. Rep. 11 Eq. 306.

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upon the trusts thereinafter specially declared, "that is to say, I leave and bequeath to my dearly beloved wife *Elinor Foot* £400 per annum to be paid to her during her viduity, and no longer, in equal half-yearly payments, out of the profits and issues of my trade and business (commencing from the day of my death), to be hereafter carried on and conducted by my three elder sons, *Lundy Foot*, *James Foot*, and *Simon Foot*, in trust for the benefit of my said wife and children, as here and hereinafter directed, as likewise out of all profits arising from all and every part of my estate and property whatsoever;" the annuity to be paid half-yearly commencing from the day of his death. He then left legacies to his sons and daughters,—£10,000 to *Lundy Foot*, £5000 each to *Frederick* and *William*, and £5000 to each of the daughters, to be paid at twenty-three or marriage, and directed certain allowances to be paid in the meantime for the education and maintenance of each child. And he left all his stock in trade, &c. to his three elder sons "on their faithfully performing all matters and things herein directed, and carrying on my trade and business." He directed his house at *Holly Park*, in the county of *Dublin*, to be sold, and the produce to accumulate "until all the provisions of this my will are carried into effect," and then to go to his three eldest sons. He also gave them certain canal shares. After many other provisions not necessary to be mentioned, the will went on thus: "And whereas I am possessed of certain grounds in the county of *Carlow*, called *Seskin Ryan*, subject to a mortgage thereof executed by me to the trustees of my marriage settlement for the sum of £5000, and am also possessed of the ground rents of three houses in *Sackville Street* which were assigned by me to the trustees of my marriage settlement upon the trusts therein mentioned, now I do hereby direct that the rents, issues, and profits of the said lands of *Seskin Ryan* and of the said houses in *Sackville Street*, be paid to my said wife during her life in lieu of her jointure, provided she shall continue unmarried, and after the decease or marriage of my said wife, I give and bequeath the said lands of *Seskin Ryan*, and all my estate, right, title, and interest therein, to my eldest son *Lundy Foot*, his heirs and assigns, and after the decease or marriage of my said wife I give and bequeath the ground rents of the said three houses in *Sackville*

Street unto my said sons *James* and *Simon Foot*, their heirs and assigns, equally, share and share alike." And as to the moneys arising from the sale of *Holly Park*, and as to *Seskin Ryan* bequeathed to *Lundy Foot*, and the houses in *Sackville Street* bequeathed to *James* and *Simon*, he said: "I will, order, and direct that all the said bequests shall stand and hold good to them, *Lundy*, *James*, and *Simon*, only on condition of well and truly paying the several legacies herein directed, and discharging with fidelity the different trusts by this will committed to them." The will contained a clause in these words: "I hereby direct that a schedule of all my effects and property of what nature soever may be taken as soon as possible after my decease, and copies of same given to my wife and to all my trustees and executors, and then all such properties contained in such schedule and duly witnessed, shall become the sole property of my three sons, *Lundy*, *James*, and *Simon*, on paying and discharging as aforesaid the different legacies and trusts in this my will, and in such case I hereby nominate, constitute, and appoint them, the said *Lundy*, *James*, and *Simon*, my residuary legatees." He constituted *Shaw* and *Franks*, his wife, and *Lundy*, *James*, and *Simon*, "guardians and executors of this my will and testament."

The testator died on the 2nd of September, 1824. The sons named obtained probate of the will. Mr. *Franks* and Mr. *Shaw* did not act. All the children attained the age of twenty-three.

The widow entered into possession of the rents of *Seskin Ryan*, and of the houses in *Sackville Street*, and so continued to the time of her death in April, 1865.

Lundy Foot, the eldest son, entered the Church, and arrangements were made between the three brothers for his ceasing to take part in the management of the business. On his mother's death he entered into possession of the lands of *Seskin Ryan*.

For many years the business continued profitable, the annuity was paid out of its profits and the account kept in the books of the firm, but latterly it fell off, and a considerable sum of money, in consequence of such falling off in the profits of the business, became due to the widow in respect of her annuity. The last payment made (being only a portion of what was due) was made in 1862. By her will she left all her effects, including the arrears of

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the annuity, to her daughter, *Cecilia Eleanor*, who took out administration to her.

The Rev. *Lundy Foot* died in January, 1873, and his executors (the Appellants) entered into possession of *Seskin Ryan*.

On the death of *Cecilia Foot*, which happened on the 3rd of October, 1873, the present Respondents took out letters of administration of her estate, and then claimed payment of the unsatisfied arrears of the annuity. On the 19th of July, 1875, they filed their bill in the Court of Chancery, praying that an account might be taken of the arrears of the annuity, and that they might be declared entitled to be paid out of the real and personal estate of *Jeffrey Foot*, that that estate might be administered, and the trusts of his will carried into effect, and for a receiver to collect and receive the rents and profits of the outstanding estate of the testator, including the lands of *Seskin Ryan*, and for general relief.

The present Appellants (the Defendants in the suit) put in their answer, setting up, so far as the personal estate of the Rev. *Lundy Foot* was concerned, that the Plaintiffs were barred by the *Statute of Limitations*, and that on the true construction of the will of *Jeffrey Foot* the lands of *Seskin Ryan* did not on the death of *Jeffrey Foot* nor subsequently become charged with the payment of the annuity.

The Plaintiffs amended their bill, and insisted that the will of *Jeffrey Foot* contained an express trust for the payment of the annuity.

The cause was heard before the Master of the Rolls in *Ireland*, and on the 22nd of February, 1877, he made a decree declaring that the lands of *Seskin Ryan* and the other property taken by the three brothers were taken subject to the express trust of providing for the payment of the annuity, and he directed accounts accordingly. This appeal was brought against that decree.

Mr. *Southgate*, Q.C., and Mr. *Richey*, Q.C. (of the Irish Bar), (Mr. *G. E. Price*, also of the Irish Bar, was with them), for the Appellant:—

Of course where a trust is created for the payment of debts the creditor is not barred by the statute: *Dillon* v. *Cruise* (1). But

(1) 3 Ir. Eq. Rep. 70.

there was here merely a charge on the estate, and not a trust, and every charge on an estate does not create a trust though it imposes a burden: *Commissioners of Charitable Donations* v. *Wybrants* (1). The land must, in order to constitute a trust, be given for the purpose of the payment of the money: *Hunt* v. *Bateman* (2). In *Watson* v. *Saul* (3) the estate was given in trust to sell, and in the meantime from the rents and profits to pay the debts and legacies charged thereon by the testator's will. There the property was designated as applicable to a particular purpose only, and that was held to be an express trust. There is nothing of the sort here. In *Dickenson* v. *Teasdale* (4), the testator charged his real estates with the payment of his debts, if his personal estate was insufficient to pay them, and he directed his executors to raise sufficient to pay them by mortgage or otherwise. There a charge was created and a duty imposed and means provided to meet the charge, but Lord *Westbury* there held that no express trust was created. In *Carter* v. *Salt* (5) there were clear words of trust, so that no doubt could be entertained. In *The Attorney-General* v. *The Wax Chandlers' Company* (6) the whole of the property was given for the exclusive purposes of the charity, and there could be no doubt that a trust as to the whole was created. That was a case much relied on by the Master of the Rolls, but it is really inapplicable here, for there is no such all inclusive disposal of the property to be found in this will. The estate of *Seskin Ryan* is given to the widow for her life—no trust could exist then—it is to go to *Lundy Foot* on her death, and no trust is impressed on it in that part of the will. It is now only sought to be charged with an implied trust by means of expressions which have no such effect—and the whole scope of the will, shewing great favour to *Lundy Foot*, contradicts the possibility of the testator ever having had such an intention. The words in the latter part of the will, however urgent in themselves to bind the sons to do what the testator desired, had the effect only of imposing a charge, but not creating a trust: *Hodge* v. *Churchyard* (7).

(1) 2 J. & L. 182.
(2) 10 Ir. Eq. Rep. 360.
(3) 1 Giff. 188.
(4) 1 De G. J. & S. 52.
(5) 1 Ir. Eq. Rep. 97.
(6) Law Rep. 6 H. L. 1.
(7) 16 Sim. 71.

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Jacquet v. *Jacquet* (1) shewed distinctly that to create a trust the most clear and undoubted expressions must be used, and there in the same will, one estate was held liable to a trust while another was declared free from it.

Wright v. *Wilkin* (2); *Cook* v. *The Stationers' Company* (3); *Lewin* on Trusts (4); *Sugden* on Powers (5); *Ball* v. *Harris* (6); *Gregg* v. *Coates* (7); *Kingham* v. *Lee* (8); *Re Skingley* (9); *Proud* v. *Proud* (10); and *Thomson* v. *Eastwood* (11), were referred to and commented on.

The Solicitor General for Ireland (Mr. *Gerald Fitzgibbon*, Q.C.), and Mr. *Kay*, Q.C. (Mr. *John Naish*, of the Irish Bar, was with them), for the Respondents:—

The cases all shew that where there is a duty to be performed, and where land is given to a person to enable him to perform that duty, a trust is created to insure its performance. It was so here. Nothing could be more marked than the testator's desire that his sons should perform the duties which he imposed upon them. They were to carry on the business, "in trust for the benefit of wife and children," and the annuity was to be paid, not only out of the profits of the business, but "out of all and every part of my estate and property whatsoever." These words were large enough to fix it upon the land as well as the business. And then after giving *Seskin Ryan* and the houses in *Sackville Street* to his three sons, he says that these gifts are to stand good to them "only on condition of well and truly paying and discharging with fidelity the different trusts by this will committed to them." So that any argument founded on the mere use of the word "condition," as appeared to be the case with some of the decisions referred to on the other side really went for nothing, for not only the word "condition," but the word "trusts," was found in this very sentence, and that word "trusts" was employed by the testator to describe the duties which he imposed on his sons. And no one

(1) 27 Beav. 332.
(2) 2 B. & Sm. 232.
(3) 3 My. & K. 262.
(4) Chap. 8, s. 2, par. 12.
(5) 8th Ed. Ch. 4, s. 1, par. 15, p. 106.
(6) 8 Sim. 486; 4 My. & Cr. 264.
(7) 23 Beav. 33.
(8) 15 Sim. 396.
(9) 3 Mac. & Gord. 221.
(10) 32 Beav. 234.
(11) 2 App. Cas. 215.

could read the will without seeing that the testator imagined he was creating trusts that were to be binding on the persons named as his trustees. The trusts were not properly performed, and the annuity fell into arrear—the widow did not press for payment of the arrears, but she did not on that account lose the right to them for the benefit of her estate. She was not guilty of laches so as to affect her own rights or the rights of her legatees, for those rights could not be affected by delay, in a case where, as here, an express trust existed. The case of *Watson* v. *Saul* (1) is a clear authority for the Respondents: the words there are not stronger than the words in this will in directing rents and profits to be employed in the payment of debts and legacies; and, as in *Hunt* v. *Bateman* (2), a trust was created, the land being vested in the devisees for the very purpose of satisfying the debts and legacies. This case falls exactly within the rule stated in the *Commissioners of Charitable Donations* v. *Wybrants* (3), it is a gift expressly on a trust, and the person taking the estate being bound to give effect to the gift, his duty is described as a trust. The words of this will may not be in all parts happily selected, but the testator clearly intended to impose on his sons a trust, and, by marked expressions as to forfeiture of their rights, to make them responsible for its due performance. The passage in *Sugden* on Powers (4) does not imply any doubt on the part of that learned lawyer that what might formerly have been treated as a devise upon a condition would now be treated as a devise upon a trust, for in another work, *Sugden* on the New Statutes relating to Property, he says, expressly (5), "a devise to executors on certain trusts with a direction to them to pay the debts, does create a trust; it imposes on them a duty and furnishes them with the means to perform it." That exactly describes what has been done in this will. In *Hodge* v. *Churchyard* (6) the devises were made, and the remainders stated, and after all that had been done there came the words, "paying £10 a year to *M. C.* for life;" but that was clearly only a charge created after the estates had been absolutely given, and the words of that will were in no way to be compared to those found

(1) 1 Giff. 188.
(2) 10 Ir. Eq. Rep. 361.
(3) 2 J. & L. 182.
(4) 8th Ed. c. 4, s. 1, par. 15, p. 106.
(5) 2nd Ed. c. 1, s. 6, par. 29, p. 110.
(6) 16 Sim. 71.

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here. And in *Jacquet* v. *Jacquet* (1) the testator made a distinction between his two estates, imposing on one of them alone a clear trust, and leaving the other as a part of his general residue, although charged with the ordinary liability, like the rest of his estates, to the payments of his debts. Here, as in *Thomson* v. *Eastwood* (2) the estate was given for the purpose of the payment of debts and legacies; but the words of the will here were more imperative than in that case, for there the gift was merely to enable the donee to do what was directed, but here the will declared the gifts to depend on the condition of the donees performing the "different trusts" which the testator had "committed to them."

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this is an appeal from a decree made in the Court of Chancery in *Ireland* by the Master of the Rolls. It comes direct before your Lordships from the decision of the Master of the Rolls, inasmuch as it had its origin prior to the recent *Judicature Act* altering the judicature of that country. According to the present practice the decision would have gone for review before the Court of Appeal in *Ireland* before it could have come to your Lordships' House; and I cannot help regretting that, in a case involving the construction of a somewhat obscure will, the parties have not adopted the course which was open to them of taking the opinion of the Court of Appeal in *Ireland*, before they came before this House, from the decision of a single Judge. However, the course they have taken was also open to them as the law then stood; but it will not be open to any suitor in future to pursue the same course.

My Lords, the case arises, as I have said, upon the construction of a will, which is certainly of some obscurity: it is the will of *Jeffrey Foot*, and it is dated the 25th of July, 1818. The suit was instituted in the Court of Chancery in *Ireland* by persons who represented the widow of this *Jeffrey Foot*. They filed a bill, which substantially was a bill for the administration of the estate of that testator; and the decree as regards the greater part of it is merely a matter of course; it is an ordinary decree for the

(1) 27 Beav. 332. (2) 2 App. Cas. 215.

administration of the estate. But, inasmuch as this widow had been entitled for her life under the will to an annuity of £400 which had not been regularly paid, and in respect of which considerable arrears were due, a special claim was made by the Plaintiffs that that annuity was charged upon certain property which I shall afterwards mention, the property of *Seskin Ryan*, belonging to the testator, and a declaration was asked for by the bill that *Seskin Ryan* was a property which had been subjected to an express trust for the payment of the annuity; and that the representatives of the widow were entitled to have the arrears paid out of it.

If the property I have mentioned, namely, *Seskin Ryan*, was not subjected by the will to an express trust for the payment of the annuity, the Plaintiffs in the suit clearly had no right to any relief with regard to that property, for the widow had been dead more than six years; and, as your Lordships are aware, the 42nd section of 3 & 4 Will. 4, c. 27, provides that, "No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent" "shall be recovered," "but within six years next after the same respectively shall have become due." The Plaintiffs endeavoured to get rid of the restraint of that section of the statute by maintaining that the land of *Seskin Ryan* had been subjected by the will to an express trust for the payment of the annuity, and if so, they would bring their case within the 25th section of the same Act which provides: "That when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust* or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration." That clause has always been held to modify the enactment in the 42nd section, and to take any land which was held upon an express trust out of the provisions of the 42nd section.

Now, that being the only debateable issue which was raised by the bill, the bill in other respects having been a bill simply for the administration of the will, the Master of the Rolls considered

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the construction of the will with a view to decide this question, and came to the conclusion that the land of *Seskin Ryan* was subjected by the will to an express trust for the payment of the annuity, and declared that the land of *Seskin Ryan*, together with the other property taken by the three sons of the testator under the will of *Jeffrey Foot* the testator, were taken by them subject to an express trust to pay to *Elinor Foot*, the widow of the testator, the annuity of £400, late Irish currency, bequeathed to her by the testator. It is that declaration which is challenged by this appeal. The decree in other respects is admitted to be regular, but that declaration and the provision consequential upon it with regard to the payment of the costs out of the land of *Seskin Ryan*, are challenged by this appeal.

The question, as I have said, depends upon the construction of an obscure will, but I will ask your Lordships in approaching the decision of that matter to bear in mind what must be found in the will in order to bring the case under the 25th section. The land must be vested in a trustee upon an express trust, and then the right of the *cestui que trust* to bring an action is saved in the manner pointed out by the 25th section. There must be a trustee in whom the land is vested; there must be an "express trust," by which I understand the Legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience; a trust arising upon the words of the instrument itself. Therefore, these three things must concur; there must be land, there must be the trustee of the land, and there must be the *cestui que trust* for whose benefit in this respect the land is to be held, and all that must be found upon the construction of the instrument with which you have to deal.

Now, my Lords, with those observations I will ask your Lordships to consider the will of *Jeffrey Foot*. It will turn out, I think, that there are really only two clauses in that will which are material, although the general nature of the disposition must be borne in mind. I will premise in the first place that in a part of the will later than that to which I am about to call your Lordships' attention, the land of *Seskyn Ryan* is for the first time mentioned, and it is mentioned in this way: "Whereas I am possessed of certain grounds in the county of *Carlow* called *Seskin Ryan*, subject to a

mortgage thereof executed by me to the trustees of my marriage settlement for the sum of £5000, and am also seised or possessed of the ground rents of three houses in *Sackville Street* which were assigned by me to the trustees of my marriage settlement upon the trusts therein mentioned. Now I do hereby direct that the rents, issues and profits of the said lands of *Seskin Ryan* and of the said houses in *Sackville Street* be paid to my said wife during her life, in lieu of her jointure, provided she shall continue unmarried; and after the decease or marriage of my said wife, I give and bequeath the said lands of *Seskin Ryan*, and all my estate, right, title, and interest therein, to my eldest son, *Lundy Foot*, his heirs and assigns; and after the decease or marriage of my said wife, I give and bequeath the ground rents of said three houses in *Sackville Street* unto my said sons *James* and *Simon Foot*, their heirs and assigns." Therefore you have here a specific devise of *Seskin Ryan* to the wife for her life in lieu of jointure, and after her death (putting a second marriage out of the question) to the eldest son *Lundy Foot*, his heirs and assigns.

Now, my Lords, bearing that in mind, and coming back to the beginning of the will, the first dispositive sentence in the will is this: "I leave and bequeath all my estate and property, real, freehold and personal, of every kind, save and except such parts thereof as are hereby otherwise specifically devised"—and therefore from the general disposition which I have read the lands of *Seskin Ryan* were excepted—"unto *Ponsonby Shaw*, Esquire, banker, and *Matthew Franks*, Esquire, attorney-at-law, and the survivor of them, and to the heirs, executors, and administrators of such survivor, upon trust nevertheless to, for, and upon the several uses, intents and purposes hereinafter mentioned, expressed, and declared of and concerning the same, and to and for no other use, intent, trust, or purpose whatsoever." Therefore this general disposition, from which, as I said, *Seskin Ryan* is excepted, is made to persons who undoubtedly are trustees, and who are to hold upon the trusts which are to be mentioned.

Then the will continues: "I leave and bequeath to my dearly beloved wife *Elinor Foot*, otherwise *Williams*, four hundred pounds per annum, to be paid to her during her viduity, and no longer, in equal half-yearly payments, out of the profits and issues of my

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trade and business, commencing from the day of my death, to be hereafter carried on and conducted by my three elder sons, *Lundy Foot*, *James Foot*, and *Simon Foot*, in trust for the benefit of my said wife and children as here and hereafter directed." Therefore the first property out of which the annuity of £400 is to be provided for the widow, is the profits and issues of his trade and business, which trade and business is spoken of as a trade or business which was to be conducted, under subsequent provisions of the will, by his three sons, in trust for the benefit of his wife and children. No doubt, as regards that trade and business, it would appear from this that the three sons were looked upon as trustees to carry on the trade in the first place "for the benefit of" the wife (which must mean for the purpose of providing her annuity), and for the benefit of the children. Then he continues: "as likewise out of all profits arising from all and every part of my estate and property whatsoever, said annuity to be paid to my wife in equal half-yearly payments commencing from the day of my death."

Now, my Lords, I stop here for the purpose of determining, so far as it can be determined, whether there is, in the words that I have read, any reference at all to *Seskin Ryan* as the source out of which this annuity, or any part of it, was to be provided. My Lords, I must say that, on the question of construction, I should be of opinion that the words which I have read do not refer to *Seskin Ryan* at all, and I am of that opinion for two reasons. In the first place, it appears to me to be in the highest degree improbable, in fact to be scarcely a supposition which one can make, that the testator giving *Seskin Ryan* to his wife for her life, that is to say, giving the whole of the rents of it to her for her life, could have intended to charge, or could have supposed he was in any way charging, the annuity of £400 a year upon those very rents which already belonged or would belong to her, the person for whom the annuity was provided. It may be said that the rent would be hers only for her life, and that the reversion would remain. But, my Lords, testators do not imagine when they provide an annuity, especially when, as this testator did, they provide an annuity for life upon amply sufficient security, that there will be any arrear due after the life of the wife. The hypothesis of the

testator is, that the annuity will be regularly and punctually paid; and that being so, it is, I repeat, scarcely possible to imagine that he could have supposed that any part of it was to be paid out of those rents which were given to the wife as a separate and specific devise to her for her life.

But, my Lords, there is another reason. No doubt a trust is here constituted for the payment of the annuity to the wife, but the trustees are the trustees of the will, *Shaw* and *Franks*, and there is a bequest and devise to them of all the property of the testator, except what was specifically bequeathed afterwards, upon trust for the trusts mentioned in the will, the first of which was the payment of the annuity. No doubt one item of property afterwards specifically bequeathed, namely, the business of the testator, is pointed out specifically as a fund out of which the annuity is to be paid; but when, passing from that, he orders it also to be paid "out of all profits arising from all and every part of my estate and property," I read that, according to the natural construction of the words, to mean the estate and property of which I am now speaking, namely, the estate and property which I hereby vest in my trustees for the purpose of executing the trusts reposed in them; and if that be so, that again will exclude *Seskin Ryan* altogether.

My Lords, my first observation, therefore, is that according to what I apprehend to be the fair and natural construction of these words, *Seskin Ryan* is altogether excluded from them. But if it be the case that under the general words "out of all profits arising from all and every part of my estate and property whatsoever," *Seskin Ryan* ought to be included, then I must observe that it is included merely by way of charge, and without any single word which points clearly to a trust for the application of those rents. There is no person mentioned who is a trustee; there is certainly no "express trust" mentioned as to the application of the rents. And moreover, if it be a charge, then the widow as the tenant for life would be bound to keep down the charge, and if she did not keep it down it would not lie in the mouth of her representatives to say that there was any right, in consequence of the annuity falling into arrear, to claim the benefit of the 25th section of the *Limitation Act*, 3 & 4 Will. 4, c. 27.

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I therefore pass from this first clause, repeating the observation that, as I construe it, it does not refer to *Seskin Ryan* at all, but if it does refer to *Seskin Ryan*, it at the utmost imposed a charge upon *Seskin Ryan*—a charge which the widow herself, whatever rights she might have of contribution from other parts of the property, would be bound in the first instance to keep down.

Now, my Lords, I pass from that to the other part of the will. As I read the judgment of the Master of the Rolls, I do not understand that his Honour, if he had had to deal with the first clause of the will, would have come to the conclusion that an express trust had been created by that clause. I come to the latter clause of the will. My Lords, I speak of "clause" in the singular number there, because there is a later clause in the will to which the Master of the Rolls in his judgment refers, but which, upon more accurate examination at your Lordships' Bar, I think your Lordships were satisfied had no application to the lands of *Seskin Ryan* at all. I will read it in order to place it out of the consideration of the question altogether:—[His Lordship here read the clause directing a schedule of his effects to be prepared: see *ante*, p. 977.]

My Lords, it was with regard to this clause that the Master of the Rolls said that it appeared to him to remove any doubts there might be upon the earlier clauses. Now if there are doubts upon the earlier clauses, this clause certainly does not remove those doubts so far as the lands of *Seskin Ryan* are concerned, for I think it perfectly clear that this clause has no reference whatever to *Seskin Ryan*. It has reference to property which was to be scheduled immediately after the testator's death, and, when the schedule of it was duly witnessed, was to become the sole property of the three sons, *Lundy*, *James*, and *Simon*, upon certain terms. My Lords, that applies to all the property of the testator engaged in his business, for that was to become the possession of the three sons, but it could not in any way apply to *Seskin Ryan*, for *Seskin Ryan* was not under any conditions or in any event to become the property of the three sons. It was given in remainder, as I have said, after the death of the mother to the eldest son *Lundy* only.

My Lords, passing therefore from that clause, we come to the only other clause which bears upon the question, namely, "As to

the moneys arising from the sale of *Holly Park*, and as to my shares or stock in *Grand Canal* and *Royal Canal*, herein bequeathed to my sons, *Lundy*, *James*, and *Simon*, as well as my interest and estate in the lands of *Seskin Ryan* bequeathed to my son *Lundy* on the death of his mother, and likewise the ground rents of three houses in *Sackville Street* bequeathed by me herein to my sons, *James* and *Simon*, I will, order, and direct that all said bequests shall stand and hold good to them, *Lundy*, *James*, and *Simon*, only on condition of well and truly paying, or causing to be paid, the several legacies herein directed, and discharging with fidelity the different trusts by this will committed to them." My Lords, the words which are important here, the words which are said to create an express trust, are these, "on condition of well and truly paying, or causing to be paid, the several legacies herein directed," and "discharging with fidelity the different trusts by this will committed to them."

Now, let me examine each of those two clauses separately. I will take first the clause "on condition of well and truly paying, or causing to be paid, the several legacies herein directed." My Lords, it appears to me not to be necessary to decide it, but if it were, I should doubt very much whether the word "legacies" as here used could include and cover the annuity given to the widow. There is no doubt that the word "legacy" is sufficient to include an annuity, but it is a word *ancipitis usus*, which sometimes may include an annuity, and sometimes may not; whether it does so or not depends upon the context. Now it seems to me in the highest degree irrational to suppose that the estate and interest in *Seskin Ryan* was meant by the testator to be bequeathed to his son *Lundy* at the death of his mother, on condition of well and truly paying the annuity given to the mother for her life, when as I have said, she had the whole of the rents of *Seskin Ryan* herself for her life—I therefore, if it were necessary to decide it, should hesitate long before I could hold that the word "legacies" here included that annuity.

But let me suppose it does include that annuity: Is this an express trust of the land of *Seskin Ryan* for the purpose of paying the annuity? My Lords, I apprehend that it is not. It was decided, and the decision has always been followed and never

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quarrelled with since, in the case of *Hodge* v. *Churchyard* (1), that a devise of land to pay a sum of money to *A. B.* was a charge, and was not a trust for *A. B.* And, my Lords, the word "pay" surely cannot mean more than the words "well and truly pay," and the words, "well and truly pay," must mean simply on condition of well and truly paying; and therefore, it being established law that a devise to *A.* "paying" a sum of money to *B.* is not a trust, but is a charge, it must also be the law that a devise to *A.* "to well and truly pay" to *B.* is not a trust, but is a charge; and a devise to *A.*, "on the condition of well and truly paying," must be a charge and not a trust. Therefore, taking the word "legacies" to include the annuity, there is here a devise of the remainder of *Seskin Ryan* to the son, at the utmost charged with the condition of paying the annuity, that is to say, the arrears of the annuity, to the widow.

Now, let me take the other clause upon which, after all, the greater part of the argument was rested, namely, "discharging with fidelity the different trusts by this will committed to them." My Lords, the question is, not whether a trust is here referred to, for undoubtedly a trust is here referred to, but whether this is an express trust of *Seskin Ryan.* Is there here an express trust of *Seskin Ryan,* and do these words make the widow a *cestui que trust* of *Seskin Ryan?* My Lords, I cannot read the words in any such way. There is no doubt a condition here that the devisee, in this case the eldest son, is to discharge with fidelity any trust which by the will has been committed to him and to his brothers. But what was the trust which by the will was committed to him and to his brothers? The trust that by the will was committed to the sons was to manage the business for the benefit of the mother and the other members of the family. That was the trust;—a trust of the business, and not a trust of *Seskin Ryan.* Therefore, you have here, not an express trust of *Seskin Ryan,* but a devise of *Seskin Ryan* on the condition that another trust is faithfully performed. My Lords, what the consequence of that may be, what the relief given under a condition of that kind in the Court of Chancery may be, it is not necessary here to consider. It is quite sufficient to say that that is not an express trust of the lands of

(1) 16 Sim. 71.

Seskin Ryan within the meaning of the 25th section of the *Limitation Act*, the 3 & 4 Will. 4, c. 27.

My Lords, that is the whole of this case. I should be sorry to say that a case in which it was necessary to construe a will of this kind was a case of clearness, or a case in which the conclusion can be arrived at otherwise than by spelling out the construction with anxiety and trouble; but, having done so, and having endeavoured to keep before the mind clearly what is the character of the disposition in this will, I am obliged to say, speaking judicially, that there is not established here any trust whatever, within the meaning of the 25th section, upon the lands of *Seskin Ryan*. Therefore, my Lords, I should propose to your Lordships to reverse the decision of the Master of the Rolls so far as regards the part of the decree by which the declaration as to the lands of *Seskin Ryan* is made, and also that part which declares that the "costs of the said Plaintiffs and Defendants are payable out of all the property which the said *Lundy Foot*, *James Foot*, and *Simon Foot*, or any of them took under the will of the said *Jeffrey Foot*, subject to and bound by the express trust above declared." That will leave standing the declaration that the Defendants are "entitled to their costs incurred in this cause, up to and including this hearing, such costs to be taxed by the Taxing Master." How those costs shall be provided for must be dealt with afterwards in an administration suit. My Lords, I think that the Appellants ought also to have their costs of this appeal.

LORD O'HAGAN:—

My Lords, in this case there is no dispute as to facts, and there is in my view only one question of law.

It is conceded in the judgment of the Master of the Rolls, and has not been denied in this House, that the claims of the Respondents are barred by the statute unless there be an express trust excepting them from its operation. The Appellants contend that there is no such trust, nor any trust at all, nor any charge upon the premises sought to be affected. The Respondents insist that they are bound by an express trust, and on this ground only the decree we are considering was founded. It does not seem to me necessary to the case of the Appellants that they should establish

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the non-existence of a charge; it is enough for the contention if there was a charge merely, and not such a trust as the statute contemplates. It does not concern them that in an ordinary administration suit the Appellants might have obtained relief (indeed have obtained relief) without special reference to the lands of *Seskin Ryan*.

My Lords, I have the most sincere respect for the distinguished Judge who ruled in favour of the Respondents; but after considering the matter with great anxiety and care—I feel compelled to differ from him—I find no language in the will of *Jeffrey Foot* binding *Seskin Ryan* with an express trust for the annuitant whom they represent. That will is a confused and inartistic paper, the provisions of which are not always clear or always consistent with each other; but looking as well to its general purpose as to its particular indications of intention, and applying to it the canons of construction on which the Respondent's counsel have ably relied, I cannot discover in the bequest of the annuity, or in any of the passages which have a possible relation to it, the elements of an express trust. Such a trust must be created *eo nomine*, or by the gift to the trustee of property not merely charged with or subject to a payment, but so dedicated by clear and distinct words as to fix on the trustee a fiduciary obligation to apply it for that special purpose. It is not enough that he should be personally required to make the payment and entitled to benefit if he make it, or rendered liable to penal consequences if he fail to do so. The devise must bind the property in his hands and cast on it a direct liability to the *cestui que trust*.

This is the doctrine very clearly enunciated by Vice-Chancellor *Wigram* in *Francis* v. *Grover* (1) as to a will in which the testator used the following words:—"I hereby charge and make liable all my freehold and leasehold estates to the payment of the said several annuities given by this my will." And Sir *James Wigram* said: "Where an annuity is given by will and the real estate of the testator is charged with the payment of it: and then the estate is simply devised charged with the payment of the annuity, my opinion is, that this is not a case of express trust within the 25th section of the statute. It is a bequest or devise which creates

(1) 5 Hare, 39; 15 L. J. Ch. 99.

a liability in favour of the annuitant, but it does not impose any fiduciary character on the devisee."

And to the same effect is the judgment of Lord *Westbury* in *Dickenson* v. *Teasdale* (1), "The words 'express trust' in the statute are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law. Two things must combine here. There must be a trustee with an express trust and an estate or interest in lands vested in the trustee, and which, therefore, the trust must affect. The subject-matter of the trust is to be dealt with in conformity with the trust." And to the same effect are *Jacquet* v. *Jacquet* (2) and other cases.

Now, reading the will of *Jeffrey Foot* in the light of these authorities, and assuming that I have correctly formulated the principle which they sustain, I am of opinion that the Respondents fail to establish any express trust within the meaning of the statute. Various trusts the testator did undoubtedly create for various purposes, and in the interest of various individuals; but the passages on which the counsel for the Respondents principally or altogether relied in support of their argument appear to me quite inadequate to commend it to the assent of your Lordships. The first of these, after the introduction which has been stated already by my noble and learned friend the Lord Chancellor, the first passage really relied upon was this: "I leave and bequeath to my dearly beloved wife, *Elinor Foot*, otherwise *Williams*, four hundred pounds per annum, to be paid to her during her viduity and no longer, in equal half-yearly payments, out of the profits and issues of my trade and business, commencing from the day of my death, to be hereafter carried on and conducted by my three elder sons, *Lundy Foot*, *James Foot*, and *Simon Foot*, in trust for the benefit of my said wife and children, as here and hereinafter directed, as likewise out of all profits arising from all and every part of my estate and property whatsoever, said annuity to be paid to my wife in equal half-yearly payments, commencing from the day of my death."

Now the Respondents may have good ground for contending that by these words the annuity of the widow was charged not only on the profits and issues of the trade and business, but like-

(1) 1 De G. J. & S. 59. (2) 27 Beav. 332.

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wise on all profits arising from all and every part of the testator's estate, including *Seskin Ryan*. It may be so, although the reasons which have been given by the Lord Chancellor to the contrary, which I shall not repeat, are very persuasive and powerful. But your Lordships are not required to say whether it be so or not. And however this may be, I do not conceive that there is any pretence for alleging the creation of an express trust by this passage only. A charge it may create; but nothing more. "A liability in favour of the annuitant," in Sir *James Wigram's* words, it may impose; but the charge and the liability do not, together, amount to an express trust or establish the fiduciary relation which such a trust implies. The charge is general; the liability affects everything bequeathed or devised. There is no specific subject-matter to which the right of the annuitant attaches, devoted to the discharge of her annuity.

The provision as to half-yearly payments carries the case no farther than that discussed before Vice-Chancellor *Wigram*, by which all the testator's estates were made liable to the payment of the annuities; and certainly no farther than that in the case of *Hodge* v. *Churchyard* (1), to which my noble and learned friend has referred, where the word "paying" attached to the estate devised was held to create a charge but not a trust. Those cases have not been and cannot be called in question; and I cannot distinguish them, and the others to which I have referred, from that which is now before your Lordships.

The testator afterwards gives his widow a life estate in the lands of *Seskin Ryan*, which it is sought to charge, in addition, with the annuity; and then comes a clause on which the Respondents have most strongly relied: "And as to the moneys arising from the sale of *Holly Park*, and as to my shares or stock in *Grand Canal* and *Royal Canal* herein bequeathed to my sons *Lundy*, *James*, and *Simon*, as well as my interest and estate in the lands of *Seskin Ryan*, bequeathed to my son *Lundy* on the death of his mother, and likewise the ground rent of three houses in *Sackville Street* bequeathed by me herein to my sons *James* and *Simon*, I will, order, and direct that all said bequests shall stand and hold good to them, *Lundy*, *James*, and *Simon*, only on condition of well and

(1) 16 Sim. 71.

truly paying, or causing to be paid, the several legacies herein directed, and discharging with fidelity the different trusts of this will committed to them." The words, "on condition," have been said to create a trust, as indicating that the three sons had cast on them the duty of discharging the legacies, including the annuity. I do not pause to consider the suggestion that the annuity could not properly be regarded as a legacy, or the effect of the words in creating a condition at Common Law. It seems to me enough to repeat that there is nothing here to impose a fiduciary obligation on trustees to satisfy a trust out of the subject-matter dedicated to it; and that, so far as I know, there is no authority for affirming the creation of an express trust, binding a particular estate, from an imposition of collateral duties, and a general direction that a testator's purposes should be carried into effect. The words "on condition" may or may not import a trust according to their collocation in the sentence. This was admitted by Mr. *Southgate*; and we can easily imagine the use of them, with the effect of compelling the payment of a particular charge out of a particular estate for a specified purpose, as expressly imposing a trust. But here we have nothing of the kind, and I do not see how the Respondents' argument is helped by them in any way.

This is the second material passage which is relied upon; and the third is this: "And I hereby direct that a schedule of all my effects and property of what nature soever may be taken, as soon as possible after my decease, and copies of same given to my wife and to all my trustees and executors, and then all such properties contained in such schedule, and duly witnessed, shall become the sole property of my three sons, *Lundy*, *James*, and *Simon*, on paying and discharging as aforesaid the different legacies and trusts in this my will." The words "paying and discharging" are very strongly relied upon indeed in the judgment of the Master of the Rolls—more strongly than almost anything else as creating an express trust; but the observations I have made, and the cases I have cited, appear to me to deprive them of any such effect. For the reasons already given by my noble and learned friend, it seems more than doubtful whether this clause had any relation whatever to *Seskin Ryan*. Apparently it had no such relation at

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all, but even if it had such relation, whatever personal claims the words might give, whatever personal liabilities they might establish in many people with different rights, they do not in my view in any way attach to the specified subject-matter of a trust the necessity of fulfilling it. "Paying and discharging" cannot have a greater effect than has been judicially attributed to "paying" in similar circumstances. The passage, like that which preceded it, distinguishes between the "legacies" and the "trusts" of the will. If the reasoning I have presented is correct, the antecedent portions of the instrument created no "trust" as to the annuity, but at most a charge. The words "paying and discharging" can gather from them no force for the Respondents' purpose. It is not necessary in order to give them a reasonable application that we should hold the annuity a "trust" rather than a "legacy."

I shall not farther discuss the provisions of the will after the exhaustive treatment of them by my noble and learned friend on the woolsack as to the general scheme of the will, and as to the devise of *Seskin Ryan*, and the general devise to the trustees excepting it. If the portions of it to which I have referred do not support the judgment of the Court below, it certainly contains no others on which the Respondents can successfully rely.

I shall only add that the cases cited by the Respondents appear to me, when well considered, to tell the other way. On the *Wax Chandlers' Case*, I need not observe I do not think that it has any specific reference to the case now before your Lordships. So far as regards the general remarks of the noble and learned Lord who presided in this House when that judgment was given, those general remarks appear to me rather to sustain the contention on the part of the Appellants.

Great reliance was placed in the Court below, and a good deal here also by the Respondents, upon an Irish case, which is very well known and very generally accepted, the case of *Dillon* v. *Cruise* (1), before Lord *Plunket*. That case was rightly decided, but it appears to me to have been wholly different from the case before your Lordships, and, in contrast with it; it appears to me to illustrate and establish the true doctrine of the law on the other side. It takes precisely the distinction on which I have endea-

(1) 3 Ir. Eq. Rep. 70.

voured to insist between a charge and an express trust, and it indicates the conditions necessary to the creation of the latter. Lord *Plunket* says of the testator, "He devises his estates, both freehold and chattel, to his wife *Eleanor*, his three sons and two daughters, to be divided between them after payment of his debts, which he had in a previous part of his will directed to be paid, so that it is not merely a devise subject to debts, nor a devise charged with debts, but he directs the debts to be paid in the first instance. It is not merely the ordinary case of a party devising his property subject to his debts, but the testator here gives precise and special directions with respect to the payment of them, and devises in such a form as to impose upon the devisees the obligation of making the actual payment of them before they can derive any benefit from his property. It has been admitted by the counsel for the Defendants that this is an express trust for the payment of debts within the meaning of the authorities on the subject." Lord *Plunket* afterwards, in a passage which I may as well refer to, uses the word "condition," and speaks of the devise as being "on condition" of paying the debts. He says (1), "Now here is an express trust for the payment of debts, not resting merely on those cases which decide that a devise of land subject to the payment of debts, or a devise charged with the payment of debts, creates an express trust in the consideration of a Court of Equity—but here there is an express devise upon the condition of paying the debts, to parties who are to take no benefit from that devise until the debts are paid, and there is a direction to have the property applied in payment of those debts in the first instance." No doubt Lord *Plunket* speaks here of the devise being on condition of paying the debts, but he repeats that there is a direction to apply the property in payment of them in the first instance; and that, until the payment, the devisees were to take no benefit. These provisions in that will created a clear express trust, and the want of them in this prevents the creation of it.

So in the case of *Thomson* v. *Eastwood* (2), referred to by the learned Solicitor-General for *Ireland*, there was an express trust beyond all controversy, and I cannot, I think, better point out my

(1) 3 Ir. Eq. Rep. at p. 83. (2) 2 Ap. Cas. 215.

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own view of the distinction between that case and this, and shew how again, by contrast, it illustrates the principle which I venture to think should guide your Lordships, than by reading a few words from my own reported decision in that case—it indicates exactly the view which I at present entertain upon the matter (1). "An express trust was created by the will; created in terms and created in effect. The testator appoints his youngest brother 'to be trustee for the following legacies'—to be trustee 'for' them, and not 'of' them—for the administration of them and the payment of them, as he afterwards directs. And then he proceeds to specify the legacies, including that with which we have to deal, and to provide for the discharge of his debts by his nephew and executor. And having done so, he proceeds, 'And to enable him to do all this, I bequeath unconditionally to him all my estates in the county of *Armagh*,' &c. Now, did not this will make *Charles Eastwood* a trustee *eo nomine* for the legacy in question here? clearly it did, and then the specification of the legacies comes in by way of parenthetical description, and what the trustee is to do 'for' and about them having been set forth, the will provides, without breath or pause, that 'to enable him to do all this,' he shall have the *Armagh* estates. It seems to me that there is here, in terms, a clear creation of an express trust. And if we look to the substance of the thing, we find all the needful elements of such a trust. There is a charge. There is a donee of an estate burthened with that charge. There is a distinct declaration that he gets that estate expressly for the purpose of working out that charge, in fulfilment of the testator's declared intention. He takes it subject to the exigency of the obligation, and he is therefore emphatically an express trustee."

Now, reliance was placed upon that case by the Respondents; but, as I have said, it appears to me that the case, rightly understood, goes precisely the other way. There we have a trustee *eo nomine*—we have a trustee in terms, and we have a trustee in effect, but here, on the contrary, though as to the annuity there may be a charge, there is no trustee *eo nomine*, there is no declaration that he takes the land for the special purpose of carrying out

(1) 2 Ap. Cas. at p. 251.

the trust, and no direction that from it the trust shall be worked out and satisfied. The distinction is plain.

My Lords, I think the authorities are, when well considered, all one way. This will is certainly an obscure will, and I do not say at all, having regard to the opinion of the learned Judge in *Ireland*, for whom I have such great deference and respect, that it is not a will upon which legal minds might come to opposite conclusions; but upon the whole, having given the matter my very best consideration, I confess I have no doubt at all, in my own mind, that there is no express trust, and therefore that the proposition of the noble and learned Lord, the Lord Chancellor, ought to be adopted by your Lordships.

LORD SELBORNE:—

My Lords, the respect which I feel for the Master of the Rolls in *Ireland* induces me to state fully the grounds of my opinion in this case, though perhaps it may be superfluous after what has been said by those who have preceded me.

The general scheme of this obscure will appears to be, to give a preference to the widow's annuity, the pecuniary legacies, the specific devises of the houses in *Leeson Street*, *Parliament Street*, and *Lower* and *Upper Exchange Streets*, and the widow's life interest in the lands of *Seskin Ryan* and the *Sackville Street* ground-rents, over the other dispositions of the testator's property. In those other dispositions, the testator has declared express trusts, for the payment of the annuity and the pecuniary legacies, of his property employed in the business of a tobacconist and his general estate not specifically given; and he has subjected to conditions (as to which, the question is, whether they create an express trust for the same purposes, or not), certain canal shares, given to his three elder sons jointly, the reversion of *Seskin Ryan*, given to his eldest son, and the reversion of the *Sackville Street* rents, given to his second and third sons. Furthermore, he has directed the sale, and the investment and accumulation of the proceeds, of a particular part of his real estate not specifically devised, called *Holly Park*, until all the provisions of his will are carried into effect; after which (and subject to the same conditions which affect the

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canal shares and the reversions), such proceeds are to go to the three elder sons; who are also made his general or residuary devisees and legatees, in the event of their paying all the legacies, and discharging all the trusts of the will.

This being the scheme of the will, it was argued for the Respondents, and it has been decided by the Master of the Rolls in *Ireland*, that the combined effect of the clause by which the widow's annuity is given, and of the conditions connected with the gifts to the three elder sons, is to create an express trust of the canal shares and the reversions of the lands of *Seskin Ryan* and the *Sackville Street* rents, for the payment of the widow's annuity and the pecuniary legacies.

The first point to be considered is, what is the proper interpretation of the words which direct the widow's annuity to be paid, not out of the profits of the business only, but "likewise out of all profits arising from all and every part of my estate and property whatsoever"? The sentence, which ends with these words, is immediately preceded by a declaration of the trusts on which the testator gave his general estate (described as "all my estate and property, real and personal, of every kind, save and except such parts thereof as are hereby otherwise specifically devised") to his trustees *Shaw* and *Franks*, "upon trust to, for, and upon the several uses, intents, and purposes hereinafter mentioned, expressed, and declared of and concerning the same"; the gift of the annuity being then introduced by a *videlicet* ("that is to say"), and being followed, after the words in question, by gifts of pecuniary legacies to the younger children. That these words, "all and every part of my estate and property whatsoever," cannot here be intended in the full universality of their literal meaning, seems to me to be proved by the facts, that certain specific chattels, and a house in *Leeson Street*, are afterwards given absolutely to the widow herself; and that there are likewise given absolutely to the three elder sons a house and stable-yard, and to the eldest son four other houses, which are not made subject to the same conditions with the rest of the gifts to them; and which, therefore (on the principle, "*Expressio unius exclusio est alterius*"), must have been meant to be free from those conditions.

Language, of like seeming universality, is also found in the residuary clause; where the testator directs a schedule to be made, as soon as possible after his death, of (what he describes as) "all my effects and property, of what nature soever"; and proceeds to say, that "all such properties contained in such schedule shall become the sole property of my three sons, *Lundy*, *James*, and *Simon*, on paying and discharging the different legacies and trusts in this my will; and in such case I hereby nominate, constitute, and appoint them, the said *Lundy*, *James*, and *Simon*, my residuary legatees." The testator cannot have meant, by this clause, to take away what he had before specifically given to the widow, and to *Lundy* only, and to *James* and *Simon* without *Lundy*; nor does it seem to me possible to construe it distributively, with reference to what had been already given to the three sons or some of them, or so as to sever the gift of the residue from that of the whole scheduled property.

Taking into consideration the entire will, I am satisfied that by the language, both of the directions for payment of the annuity, and of the residuary clause, the testator meant nothing else than the *universum* of the property dedicated to the general purposes of his will; that is, the property in the business, and the general real and personal estate not "otherwise specifically devised."

This being so, I am unable, before arriving at the conditional clause, applicable to the canal shares, and the *Seskin Ryan* and *Sackville Street* reversions, to discover so much even as a charge upon those portions of the testator's property. There can be no doubt that by this conditional clause the testator intended to take some additional security for the payment of the legacies (in which I think it best to assume the annuity to be included), and I think that a Court of Equity can, and will, find the means of accomplishing that purpose. But it is a purpose which might as well be effectuated by a charge as by a trust. It would be inconsistent with the diversity of intention and disposition apparent on the face of the will, to suppose that the testator meant merely to create one general trust of all these properties, for the payment, in the first instance, of the annuity and legacies. His affairs were not in such a state as to make it probable that he would think this necessary for any practical purpose; and the question which

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has arisen, under the *Statute of Limitations*, cannot be supposed to have been then at all in his contemplation.

The words to be construed are: that the bequests, mentioned in the clause, "shall stand and hold good to them, *Lundy*, *James*, and *Simon*, only on condition of well and truly paying, or causing to be paid, the several legacies herein directed, and discharging with fidelity the different trusts by this will committed to them." The "different trusts" here referred to are found in the prior parts of the will. They are express trusts of the business and of the proceeds of the sale of *Holly Park*. Of the former, the three elder sons were made trustees, of the latter they were also made trustees, jointly with the widow and *Shaw* and *Franks*. The condition, so far, is for the fulfilment of these particular trusts; and to fasten, by reason of it, a new "express trust" upon other property of which the sons were not otherwise made trustees, would be an implication, unnecessary in my judgment, and (if so) not justified by sound principles of construction.

It only remains to consider the other branch of the condition:—"well and truly paying, or causing to be paid, the several legacies herein directed:"—premising (what is equally applicable to the "discharge of the trusts committed to them,") that it is evidently not a condition precedent to the vesting of the bequests in the sons; nor is there any gift over to make it effective as a condition subsequent. It must, therefore, if effectual at all, be either charge or trust: and being so, I cannot distinguish the present case from *Hodge* v. *Churchyard* (1), because (though the word "condition" was not in that will), it was used in the judgment of Sir *Launcelot Shadwell* in a manner which proves that he would not have considered its addition to make any difference. The gift there was of lands to a tenant for life and remainderman "paying to" the testator's wife and daughter certain annuities. The Vice-Chancellor said: "The word 'paying' creates, not a trust but a charge or condition; and therefore the Plaintiff's claim is barred by the statute." *Hughes* v. *Kell* (2), and *Proud* v. *Proud* (3) appear to me to involve the same principle of decision, and to these other authorities might be added. The cases chiefly

(1) 16 Sim. 71. (2) 3 D. & War. 482.
(3) 32 Beav. 234.

relied upon by the Respondents, *Dillon* v. *Cruise* (1), and *The Attorney-General* v. *The Wax Chandlers' Company* (2), are not equally in point. In *Dillon* v. *Cruise* (1) an express trust was created, by clear words, very different from those of the present will. In *Attorney-General* v. *The Wax Chandlers' Company* (2) nothing more was determined than that when the whole rents and profits were directed to be employed for charitable purposes, so as to leave no surplus which the company could take for its own benefit, words of condition were sufficient to create a trust.

On the whole, my opinion is, that this is a case of charge, and not of express trust; and that the decree of the Master of the Rolls of *Ireland* ought to be varied as asked by the appeal.

LORD BLACKBURN:—

My Lords, I agree in the proposed judgment. I think the only question in this case is, whether *Seskin Ryan* was given on express trust; for if not the *Statute of Limitations* is a bar.

I will not detain your Lordships by saying anything as to the terms of this will farther than that they are confused, and that it is not in some respects easy to guess what the testator really wished to say. He may have so expressed himself as to make the reversion, after the life interest given to his wife, in the lands of *Seskin Ryan* a security for the arrears of the annuity bequeathed to her for her life (though it is improbable that he really meant this), and a Court of Equity might consequently be bound to treat the person in possession of *Seskin Ryan* as bound in conscience to pay those arrears, and so make him in one sense hold the lands on a trust. It is not necessary to decide this, for this would be a trust created by the Court, not an express trust.

I do not repeat the authorities already cited by the noble and learned Lords who have spoken. I think they all are consistent. No technical words or terms of art are required to create an express trust; but it is, I think, necessary that there should be an expressed intention to rely on, and place confidence in, the persons to whom the property is given, that they will, as trustees, apply it to fulfil the intentions of the testator. Now, I think

(1) 3 Ir. Eq. Rep. 70. (2) Law Rep. 6 H. L. 1.

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there is not to be found expressed in this will anything shewing a confidence reposed in *Lundy Foot* to pay the arrears of the annuity out of *Seskin Ryan* when it came into his possession.

LORD GORDON concurred.

Decree of the Master of the Rolls in Ireland reversed so far as appealed against; Respondents ordered to pay to Appellants the costs of this appeal.

Lords' Journals, 12th July, 1878.

Solicitors for the Appellants: *Lovell, Son, & Pitfield.*
Solicitors for the Respondent: *Wynne & Son.*

[HOUSE OF LORDS.]

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WILLIAM PARKER BURKINSHAW . . APPELLANT;

AND

JONATHAN NICOLLS . . . . . RESPONDENT.

Company—Shares "fully paid-up"—Certificates and Statutory Returns—Estoppel—Holding in Trust—Companies Act, 1867.

10 Ch D 723
11 Ch D 504
12 Ch D 199
5 Q B D 498
14 Ch D 437-8
23 Ch D 547

A company (not registered under the *Companies Act*, 1867) issued shares as "fully paid-up," and also certificates of those shares describing them as fully paid-up, and made the annual returns giving them the same description. The company entered into a contract with *G.* to purchase from him a mill and machinery in *Nottingham*, part payment for which was to be made to *G.* in "fully paid-up shares." They were not, in fact, paid-up, and there was no contract with respect to them such as is required by the *Companies Act* of 1867, s. 25. *G.* (who was really the vendor of this mill and machinery, and promoter and managing director of the company) received the shares. He was himself at the same time making a contract with *B.* for the purchase of other landed property in another county—*Cornwall*, and *B.* agreed to accept a part of the purchase-money in fully paid-up shares of the company. *B.* had just before bought this *Cornwall* property from *N.*, and *B.'s* purchase-money for it was paid to *N.* through *B.'s* solicitor, who also acted, in the conveyance, for *N.* The conveyance was made, not by *N.* to *B.* and then by *B.* to *G.*, but (at *B.'s* desire) was made direct from *N.* to *G.*, and 200 of the shares held by *G.* were handed over to *N.*, who swore that he only received them as trustee for *B.* *N.'s* name was entered on the register of the company as the holder of the shares, and he once sent a proxy to *G.* to vote at a

general meeting, describing himself therein as a shareholder in the company. The certificates of the shares were given to *B.* himself. The company was ordered to be wound up:—

Held, that under these circumstances *N.* was not liable to be placed on the list of contributories in respect of the 200 shares.

Per THE LORD CHANCELLOR (Lord *Cairns*):—In a matter of this kind the official liquidator is not entitled, when putting in force the 25th section of the Act of 1867, to disregard the actual transactions that have taken place between the parties.

If shares are taken in the course of business for valuable consideration, on the person who asserts that he who took the shares had notice that they were not actually paid up lies the burden of proof of that notice.

The 25th section of the *Companies Act*, 1867, applies to a company generally, and not to its liquidation alone.

Remarks on the unsatisfactory manner in which cases arising upon claims by liquidators are brought before the Courts.

THIS was an appeal by the official liquidator of *The British Farmers Pure Linseed Cake Company* (*Limited*) against an order of the Court of Appeal, which had reversed a previous order, made by Vice-Chancellor *Hall*, for a call of £5 per share on 200 shares in that company alleged to be held by *Nicolls* (1).

The company was constituted without articles, and was registered on the 11th of January, 1872. The capital was to be £20,000, divided into 4000 shares of £5 each. The mill and machinery necessary for the work of the company were situated at *Sutton-on-Trent*, in the county of *Nottingham*, and, when the company was about to be formed, belonged to *William James Goulton*. That person was the chief promoter of the company, and became its managing director. By an agreement dated the 9th of January, 1872, made between *William James Goulton* of the one part and *B. H. Richardson* and *T. H. Watson*, described as acting on behalf of the company, of the other part, the mill and machinery were to be purchased from *W. J. Goulton* at the price of £9000, and the company was to hand over to the vendor the sum of £5500 in the shape of scrip certificates for 1100 fully paid-up shares, the remainder to be paid on the 1st of February, 1873, and if the company should not then be in a position to pay the balance in cash, the vendor was to take it in fully paid-up shares or in promissory notes of the directors. The 200 shares, now the subject of dispute, formed part of the 1100 shares already men-

(1) *Nom. Re British Farmers Linseed Cake Company*, 7 Ch. D. 533.

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tioned. No cash was, in fact, ever paid to the company in respect of these shares, yet the form of certificate of all shares issued by the company, including the 1100 shares, described them as "fully paid up." And in all the annual summaries of the company furnished under the Joint Stock Companies Acts these shares were always described as "fully paid-up." There was no contract with respect to them, such as was required by sect. 25 of the *Companies Act*, 1867.

In the year 1872 *Nicolls* entered into a contract with one *John Bennett* for the sale to him of certain hereditaments in the county of *Cornwall* for the price of £2100. Before this sale was completed, *Bennett* contracted to sell these hereditaments to *William James Goulton* for £6000, and agreed to take, in part payment, fully paid-up shares in the *Linseed Cake Company* to the amount of £1000. The purchase of the *Cornwall* hereditaments by *Goulton* was, in form, completed in November, 1874, and the conveyance was, at the desire of *Bennett*, made by *Nicolls* direct to *Goulton*, the sum of £2100, the price of the *Cornwall* property sold by *Nicolls* to *Bennett*, being paid to *Nicolls* by a Mr. *Radcliffe*, *Bennett's* solicitor in the business, but who also acted, in the matter of the conveyance, for *Nicolls*. Upon the completion of the purchase 200 shares described, as above stated, as "fully paid-up shares," were handed to *Nicolls*, who alleged that he received them as trustee for *Bennett*, and in that character only. The certificates of the shares were handed to *Bennett* himself. These 200 shares had been in the possession of other individuals before they were held by *Goulton*. When he was in possession of them he handed them to *Nicolls*. The name of *Nicolls* was inserted in the register of the company as the holder of the 200 shares. There was a letter of the secretary of the company (a son of *W. J. Goulton*) addressed to *Nicolls*, which stated, among other things, that though the shares in the company belonged to *Bennett*, they had been transferred to *Nicolls* by arrangement of all the parties connected with the *Cornwall* purchase, and so he alone was entitled to vote at meetings. Accordingly in January, 1875, *Nicolls* executed, as a member of the company, a proxy to *Goulton* to vote for him at the ensuing general meeting. *Nicolls* never, until the winding-up of the company, had any reason to know that the shares had not been fully paid up.

On the 26th of March, 1876, a petition was presented for winding up the company, and *Burkinshaw* was appointed the liquidator. The assets of the company were very small. *Nicolls'* name stood in the deed of transfer of the 200 shares as that of the person who had agreed to take them, subject to the conditions on which the same were held by *Goulton*, and on the face of the instrument of transfer the transfer purported to be in consideration of the sum of £1000 paid to *Goulton* by *Nicolls*. Evidence was taken in the case, but *Bennett* did not make an affidavit. The Chief Clerk of Vice-Chancellor *Hall*, by his certificate, settled *Nicolls* on the list of contributories, and on the 3rd of December, 1877, Sir *Charles Hall*, at Chambers, made an order in accordance with the certificate. On appeal, the Lords Justices directed this order to be discharged with costs. This was an appeal against the decision of the Lords Justices.

Mr. *Dickinson*, Q.C., and Mr. *F. C. J. Millar*, for the Appellant:—

The idea of the Court below was that persons taking transfers of shares from an original holder, which shares were declared to be fully paid up, could not be held liable to calls upon them; and, farther, that the company was by such declaration estopped from shewing that the shares had not been fully paid up. But that would be to introduce a doctrine of equity quite contrary to the words of the statute, which absolutely required the shares to be paid up, unless there was a contract to the contrary, and that contract had been registered. There are several provisions which affect this question and shew the positive intention of the Legislature. First, there is the section which forbids the recognition of a trust in shares, with which the practice of all companies agreed. There was, therefore, no ground for treating this as a trust, for there was a legislative refusal to acknowledge the existence of such a thing. The memorandum of association spoke of members only; the memorandum of purchase spoke only of payment in cash, or scrip certificates, or fully paid-up shares. *Nicolls* accepted the shares, and accepted them on the conditions on which *Goulton* held them, and he held them as a member. *Nicolls* allowed his name to appear as a member of the company,

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and on the 29th of January, 1875, signed a proxy appointing *W. J. Goulton* to act for him at the general meeting of the company on the 1st of February, or at any adjournment thereof. He had thus done everything which could exhibit himself to the world as a member of the company, and he could not now be allowed to deny that he was so. His name, too, appeared in the proper list of the persons holding shares, where he was set down as the holder of 200 shares; and this list, originally made out in February, 1875, was repeated with his name included in it in the year 1876. All the facts went to shew that his liability was complete. Here, too, the liability to be enforced against him was not on behalf of the directors, but on behalf of the creditors of the company; and *Blyth's Case* (1) declared that the 25th section of the *Companies Act*, 1867 (30 & 31 Vict. c. 131), was made in favour of creditors, and did not apply as between the company and shareholders. In *Pagin & Gill's Case* (2) those two persons had received shares as fully paid-up shares, and received them under an arrangement that they should accept these shares as payment for inserting the company's advertisements in their paper; the shares were not fully paid up, and they insisted that they had incurred no liability, but were in fact creditors; but they were held liable as contributories. *Andress's Case* (3) was exactly to the same effect. [LORD HATHERLEY mentioned *Waterhouse* v. *Jamieson* (4) as shewing that where a shareholder has no reason to suspect fraud, but everything appears fair and reasonable, he is not bound to institute inquiries.] That case does not apply to the present. No fraud is imputed here. Though even where fraud was imputed, as in *Oakes* v. *Turquand* (5), it was declared that when a man takes shares in a company he is bound to make himself acquainted with its real condition, and to do so within a reasonable time. This case is unlike *Spargo's Case* (6), for there the payment for the property and the payment for the shares were acts to be performed at the same moment, and consequently the balancing of the accounts and the payment of the balance were treated as payments in cash. Here the reverse was

(1) 4 Ch. D. 140.
(2) 6 Ch. D. 681.
(3) 8 Ch. D. 126.
(4) Law Rep. 2 H. L., Sc. 29.
(5) Law Rep. 2 H. L. 325.
(6) Law Rep. 8 Ch. Ap. 407.

the fact, and there was nothing which could be treated as a payment in cash. And the case of *The Bahia and San Francisco Railway Company* (1), though it appeared to sanction the application of the doctrine of estoppel, shewed that if a man did that which made him appear as a member of a company he was entitled to the rights and subject to the liabilities of one; and there, too, he actually paid the value of the shares he had purchased. But *Fothergill's Case* (2) does resemble the present, and the rule established there ought to be applied here. There *F.* had sold property to the company, for which he was to be partly paid in fully paid-up shares. He received some shares, but he subscribed for other shares. These latter were not paid up, and he was held liable as a contributory upon them, not being permitted to set off what was due to him in satisfaction, for that if he had any agreement to that effect, it had not been registered according to the 25th section of the Act of 1867, and therefore could not be enforced. [LORD SELBORNE:—All these were cases in which the man had done something which made him appear to the rest of the world to be a shareholder]. *Nicolls* had done that when he signed the proxy claiming to exercise the rights and giving himself the description of a member of the company. And he had not done anything which could be set up as a payment of what was due on the shares.

Mr. *Robinson*, Q.C., and Mr. *E. Widdrington Byrne*, for the Respondent:—

These shares never had been the property of *Nicolls;* they were handed over to him as part of the payment to *Bennett*, the representation being made to him that they were fully paid up. He took them without notice that they were not so. There was no suspicion of fraud, nor anything to put the party taking the shares upon inquiry, though even if inquiry had been made the certificates, and the returns made under the statute, would have afforded the inquirer no information on the subject. On the contrary, these documents would have confirmed everybody in the belief that the shares were fully paid up. So that even *Bennett* could not be said to have had notice to fix him with liability. But there

(1) Law Rep. 3 Q. B. 584. (2) Law Rep. 8 Ch. Ap. 270.

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was a great distinction between *Bennett* and *Nicolls*, and if *Bennett* had had reason (which he had not) to put him upon inquiry, *Nicolls* had had none whatever, and had not, besides, any means of making an inquiry. And, holding the shares merely as trustee for *Bennett*, who was the person really interested in them, there was no reason whatever why he should make any inquiry. In *Waterhouse* v. *Jamieson* (1) it was distinctly declared that it was not incumbent on a shareholder to suspect fraud and institute inquiries where all appeared fair and conformable to the statutes; and that doctrine was applied in favour of a person who had become a real transferee of the shares, and had paid money to the company in respect of them. Here *Nicolls* was only the nominal transferee of the shares, and had sworn that he only held them in trust for *Bennett*. The certificates here were delivered to *Bennett*, and held by him. He was a real creditor of the person who transferred the shares to him, and therefore *Pagin & Gill's Case* (2) and *Andress's Case* (3), where no real doubt existed when the shares were transferred, could have no application here. *Bennett* alone, by the possession of the certificates, possessed the means of knowing anything of the real condition of the shares, though even those means, the certificates and the statutory returns of the company, would only have confirmed him in his belief that the shares were fully paid up. In *Spargo's Case* (4) Lord Justice *Mellish*, referring to shares described as fully paid up and then transferred as such to *bonâ fide* purchasers, said that they "were not liable to pay calls on them." It is clear that here the Respondent would, because of the existence of a real debt to *Bennett*, have a good defence under a plea of payment, and that the company having, in every document which it issued, declared the shares to be fully paid up, would have been estopped, as against a *bonâ fide* purchaser without notice, from repudiating its own repeated and solemn declarations. The case of *The Bahia and San Francisco Railway Company* (5) was a decision to shew that a company would be estopped from so repudiating its own declarations, and here the liquidator of the company was so bound, for

(1) Law Rep. 2 H. L., Sc. 29.
(2) 6 Ch. D. 681.
(3) 8 Ch. D. 126.
(4) Law Rep. 8 Ch. Ap. at p. 410.
(5) Law Rep. 3 Q. B. 584.

he was really attempting to enforce what were in truth the claims of the company.

Mr. *Millar* replied.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, this is a case which comes before your Lordships under the Winding-up Acts. I mention that circumstance at the outset for the purpose of reminding your Lordships that according to the ordinary course of litigation, your Lordships have generally to deal with cases in which there are pleadings, making allegations upon the one side and upon the other, distinctly stating the issues raised between the parties; and after referring to those pleadings and to the issues so raised, it is comparatively an easy matter to determine what evidence relative to those issues has been adduced, and how far the evidence has established the issues. My Lords, it is, I am sorry to say, altogether otherwise in the case of proceedings under the Winding-up Acts. There, no issue is raised between the parties; they come into Court upon materials brought together in the very loosest way, and defects in the evidence on the one side or on the other, are, from time to time, supplied as those defects are noticed. But in proceedings of that kind it naturally happens, and it is within your Lordships' experience as a thing of frequent occurrence, that matters are taken for granted upon the one side or upon the other, or that cases are conducted in a mode which amounts to an admission, by the one side or by the other, of certain facts; and results are arrived at by the Court upon the basis of those admissions, or upon the basis of the conduct of the parties in the management of the case. My Lords, it would therefore be very much to be deplored if at the last moment, when a case comes before your Lordships involving important matters of law, the party who felt himself in any difficulty in supporting his propositions of law were to be allowed to turn round, and point to deficiencies in the evidence on matters of fact in the Court below, deficiencies which if clearly felt, and clearly pointed out in the Court below, must almost as a matter of course have then and there been remedied.

Now, my Lords, before I refer to the propositions of law which

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arise in this matter, there is a proposition of fact which I wish, in the first instance, to speak of. There were here certain shares issued by a company which is now in liquidation, they were issued as paid-up shares, and a person of the name of *Goulton* received a large number of those shares; he was a person who had entered into a contract with the company to sell the company the property upon which its business was to be carried on. So far as I see, there was nothing with regard to that contract which was not perfectly *bonâ fide*—it is not challenged in any way—but the contract provided that *Goulton* was to receive part of his payment in paid-up shares, that is to say, he was not to pay calls upon the shares; but there being a certain number of thousand pounds coming to him in respect of the property he had sold, some part of that sum was to be taken as if he had paid the calls upon the shares allotted to him. Now, if there had been no statutory enactment forbidding a transaction of that kind, it is a transaction which might be perfectly valid, but there is a statute, to the terms of which I shall afterwards have to refer, which enacts that a contract of that kind, if it is to give to the shares which are thus handed over the attribute of being considered as paid-up shares, must be registered with the Registrar of Joint Stock Companies; and that, in this case, was not done.

Now, to pursue the narrative, what happened afterwards was this: A certain number, 200, of those shares passed away from *Goulton*. *Goulton* had, in turn, some dealings with a person of the name of *Bennett*. *Bennett* was the vendor of some land to *Goulton*, and *Bennett* in the transaction of selling that land agreed to take, as part of the price payable to him, a thousand pounds of paid-up shares in this particular company; that is to say, 200 £5 shares. The transaction between *Goulton* and *Bennett* was complete, but the shares were not transferred into the name of *Bennett*, but were transferred by *Goulton* into the name of the present Respondent, *Nicolls*. Now it is not in controversy in any way that *Nicolls* was a mere trustee for *Bennett*, and had no beneficial interest whatever in those shares. So little was he interested about them that he had forgotten at first that they stood in his name as trustee, but undoubtedly they did so stand, and the narrative that I have given of the circumstances under which

the shares came to be transferred to *Nicolls* is not in any way impeached. It is not doubted nor challenged in any way by the Appellant that the shares were transferred to *Nicolls*, and that *Nicolls* was the trustee for *Bennett*.

Now a question of fact which may become important later in the case is this: Were the certificates which represented the shares in each case as being paid-up shares handed over to *Bennett*? Did they come into his possession? The Respondent says he had not the certificates, but he says that being a trustee for *Bennett* the certificates were handed to *Bennett*, and there is a statement in his affidavit to that effect. He says, "The scrip certificates have never been in my possession, but *Bennett* informed me in the month of July, 1875, that he held the same, and that he had given notice through Mr. *Radcliffe*" (his solicitor) "to the secretary of the company not to transfer the shares standing in my name to any person, but to him, the said *John Bennett*, as they belonged to him, and he held the scrip for the same." Now, of course that statement by *Nicolls* of what *Bennett* told him is not evidence of the fact, but it is a distinct notice to the official liquidator, and to all the parties, that the case made by the Respondent in the Court below was, that he did not hold the scrip certificates but that they had been given to *Bennett*, and that *Bennett* held them, he, *Nicholls*, being a trustee, as I have previously stated, for *Bennett*. Now, if it had been alleged in the Court below when the appeal from the Vice-Chancellor to the Court of Appeal came on to be heard, that the case turned, or might turn, upon a question whether the certificates representing the shares to be paid up had ever come into the possession of *Nicolls*, or had been shewn to him, it appears to me that, as a matter of course, the Court would, or might, have ordered the case to stand over for the purpose of *Bennett* coming forward and stating himself directly what he had stated indirectly to *Nicolls*; but looking at the course the case took in the Court below, I cannot persuade myself that it ever was in the mind of the present Appellant to ask, or that he did, in the Court below, insist on farther evidence being given on that point. I look at the judgment of the learned Judges in the Court below, I look at the arguments in the Court below, and, what is more material, I look at the arguments con-

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tained in the case of the Appellant before your Lordships, and what I find he insists upon as a question of law is, first, that the official liquidator is entitled to disregard all dealings which may have arisen upon a transfer of this kind between third parties; and, under the 25th section of the statute, to have the shares treated as shares upon which no payment has been made, no matter what may be the rights of third parties with regard to them; and, secondly, that even if that is not so, the person, and the only person with whom the official liquidator has to contend, is the Respondent in this case, the trustee, and not the *cestui que trust;* and that if the Respondent cannot say, that to him, *Nicolls,* some representation was made that the shares had been paid up in cash, and that to him, *Nicolls,* the certificates were handed over, then the official liquidator may disregard the position of the *cestui que trust* altogether, and that with *Bennett's* rights he has nothing to do. Those are the propositions which, as it seems to me, were relied upon by the Appellant in the Court below, and those are the propositions which, as I think, in this case he comes to your Lordships' House to argue here. My Lords, under these circumstances, I certainly should deprecate the idea that, finding now that it may be material to know whether these certificates were handed to *Bennett,* and there not being what might be termed regular evidence that they were so handed, he is entitled to undo the proceedings which have taken place in the Court below, and to put this case into train for farther inquiry in order to supply formal evidence of this one particular fact as to which the evidence, if it had been thought material before, could have been supplied, at almost no expense, before the question reached its present stage.

My Lords, I therefore propose to assume what was assumed by the learned Judges of the Court of Appeal, what it appears to me was not contested by any of the parties, what had, as I have said, been stated, though not in the shape of formal evidence, in the documents before the Court, namely, that the certificates being in the form I have mentioned, and stating the shares to be fully paid up, were handed over to *Bennett.*

Now, my Lords, in the first place, it appears to me that the person whose position is to be looked to here is *Bennett,* and not

Nicolls, it being perfectly clear that *Nicolls* is simply a trustee, that he is simply a name legitimately used to hold the shares; that the question is, what were the dealings of *Bennett*, and not what were the dealings of *Nicolls*. Now, my Lords, the dealings of *Bennett*, as I have said, were these: He was transacting a matter of legitimate business with *Goulton*. He was selling to *Goulton* a property; he entered into a contract for valuable consideration. In return for the property he was to have a certain sum down and £1000 in the shape of paid-up shares of this company, and there are handed to him, I now assume, the certificates of those shares, representing them to be fully paid up, they being, in effect, exactly the same as if there had been indorsed upon them a certificate under the seal of the company, stating that the whole of the money due in respect of the shares had been actually paid.

Now, my Lords, that being the state of things, I proceed to examine (which is the only other matter) the section of the *Companies Act* of 1867, which is said to cut down the right of *Bennett's* trustee, and to subject him, notwithstanding what appears upon the certificate, to the payment of the nominal amount of those shares. My Lords, the section is the 25th. It is not a section, I ask your Lordships to observe, applying to proceedings in the liquidation of a company merely—it is a section applying to a company at all times and under all circumstances—it happens here that the person who seeks to put it in force is the liquidator, but the question which arises here might just as well have arisen, before the liquidation of the company, in a controversy with the company itself. What the section says is this, "Every share in any company shall be deemed to have been issued, and to be held, subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract, duly made in writing, and filed with the Registrar of Joint Stock Companies at or before the issue of such shares." Now, the effect of the section in a dealing between the company and the person to whom a share is first issued, is of course of the most simple kind. Before the Act passed the person to whom the share was issued might have said, "It is very true this is a share in a company in which so much capital is to be paid for every share, but I have made a contract with you that in return for certain services which

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I have performed, or certain property which I have sold to you, you will not require me to pay up the amount of those shares in cash, but you have agreed for valuable consideration that you will treat the transaction as if cash had been paid on them;" that would, I presume, be a perfectly valid transaction, as between the company and one of its shareholders, before this Act passed. But then the abuse of contracts of that kind having been made apparent, this Act stepped in and provided that it should be held to be an invariable preliminary condition with regard to every share, that the amount of capital which the share represented should be liable to be paid up in cash, unless there had been a contract, in such terms as I have mentioned, providing that payment in cash should not be necessary; a contract, the publicity of which was to be secured by its being filed with the Registrar of Joint Stock Companies. And, confining myself still to the question between the company and the shareholder to whom the share is allotted, the result of that section at the present day is quite clear. If a shareholder now were to come forward, as Mr. *Goulton* might have come, and should be called upon by the company to pay up the amount due upon the shares allotted to him (supposing them still to lie in his hand), although the contract he had made with the company was, as I have said, perfectly *bonâ fide*, although he had parted with his property in return for shares thus described, still, in consequence of this clause, if the shares remained his, he would have no answer whatever to the demand by the company for the full amount due upon them.

But then, my Lords, we come to consider the case of the transferee.

In the course of business *Goulton* transfers, for valuable consideration, to a transferee, a share, as to which there is a statement in the certificate made by the company, that the money has been paid up. Now I desire to know in what way this section affects a transaction of that kind. It appears to me that it leaves altogether untouched the question of the payment of the money upon the share, which payment it declares shall, no doubt, be an attribute or a condition of every share in the company. But how that is to be, or what is to be evidence of that payment, it leaves altogether untouched. If the money is paid, and if the receipt is

given for it, of course no question could be made but that the transferee would have a right to hold it as a paid-up share; but if a receipt is given for the money by the company, and the share passes into the hands of a person who has given valuable consideration for it, and knows nothing about the fact that the payment has not really taken place, there is nothing whatever in this section which would in any way invalidate his title. He comes before the Court not in any way affecting to break in upon the enactment which I have read. He says, "I bow to the words of the enactment. I have not in any way attempted to interfere with it, but I have taken, in the course of business, a share, in regard to which I have the representation of the company that that section has been complied with."

My Lords, as the Master of the Rolls said in the Court below, it would paralyze the whole of the dealings with shares in public companies if, a share being dealt with in the ordinary course of business, dealt with in the market with the representation upon it, by the company, that the whole amount of the share was paid, the person who so took it was to be obliged to disregard the assertion of the company, and, before he could obtain a title, must go and satisfy himself that the assertion was true, and that the money had been actually paid. In the first place, as a matter of business, we know that the affairs of mankind could not be conducted if that were necessary; but in the next place, even if such a person were minded to make the investigation, he would be absolutely without the means of making it—it would be impossible for him to obtain accurate information as to whether this state of things was true or not.

Now, my Lords, a good deal was said as to the person on whom the burthen was to be thrown of proving that a person in the condition of *Bennett* had, or had not, notice that the shares were fully paid up when he took them accompanied with the certificate which I have mentioned. My Lords, it appears to me that if a share were taken in the course of business for valuable consideration, as I assume was the case with the shares taken by *Bennett* here, it is for those who say that the person so taking the share had notice that the share had not actually been paid up, to prove that he had this notice; it is for those who assert it, and not for the

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person who denies it, to discharge that *onus* of proof. Therefore I repeat that the only matter of evidence as to which I think there can be any doubt would be the simple fact of whether the certificates were in the hands of *Bennett*. I do not again state to your Lordships the reasons which lead me to conclude that that was not seriously in doubt or controversy in the Court below; and therefore, assuming that the statement of the Respondent, made originally upon his affidavit, that the certificates were in the hands of *Bennett*, is correct, it seems me that the case of the Respondent is completely proved, and that the 25th section does not entitle the Appellant to call upon him for the payment of the amount of the capital represented by those shares.

My Lords, I therefore move your Lordships that the judgment of the Court below be affirmed, and this appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, I am of the same opinion; and, first, with regard to this matter of evidence, it appears to me that if you look to the whole nature of the transaction it must be assumed by your Lordships, as it evidently was assumed by the Judges of the Court below, that this question was never thought one that could be brought into serious controversy; and no controversy was raised upon it. Moreover, if you look to the course which these matters take which are not conducted by regular process of suit and a regular course of examination and evidence, but are conducted in a comparatively loose and irregular manner; and if you look farther to this fact, that before the matter can reach your Lordships' House on appeal the leave of the Court must be obtained for that purpose, and then see what was said and done, not only at the original hearing, but what was said and done in the affidavit supporting the application for leave to appeal, I think it is impossible to consider that there was any serious controvery raised upon the only subject which is happily now of any importance in the matter of evidence, namely, whether Mr. *Bennett* did or did not receive the certificates of shares stating those shares to be fully paid up. And we get a considerable way in our inquiry in looking at the statements made by the Appellant upon the present appeal,

for they do not leave it in controversy whether or not there existed two classes of certificates, that is to say, certificates of shares not fully paid up, and certificates of shares fully paid up; because in the statement of the case it is said, "The form of certificate of all shares issued by the company including the said 1100 shares," which we are told in another paragraph include those in dispute at the present moment, "described the shares as fully paid up."

My Lords, the only question we have to ask ourselves upon the present occasion which has occasioned, no doubt, all your Lordships some degree of anxiety, wishing, as we should always do, to proceed upon fixed and established evidence in the case, is whether or not these certificates, which only exist in the shape of certificates of shares fully paid up, got into the hands of *Bennett* or not. My Lords, I think the usual mode of transacting business, and that takes us another step and very far again in the same direction, is that when a man does take a transfer of shares he desires to have certificates of the transfer, if he had these certificates they could only be proper as certificates of what is represented in the books. The books represent these shares as paid up, and therefore we are not surprised to find that statement in the Appellant's case, namely that the certificate represented the shares as fully paid up, tallying with the statement found in the books, which is bound to be true.

Then, my Lords, the only remaining question is, whether *Bennett* purchasing did that which every other purchaser does, namely, desire to be fortified in this position of shareholder, through the medium of *Nicolls* his trustee, in having possession of those documents without which there would be a difficulty always in transferring the shares, and which therefore he, like all men in the ordinary conduct of their business, would take possession of. *Nicolls* tells you again—and this is a third step in this process of evidence; I did not take the certificates of the shares, because, being only a trustee, I was not the real purchaser; *Bennett* was the purchaser. He says,—speaking of what was represented to him by *Bennett*,—*Bennett* represented to me that he had the certificates. Therefore one is not surprised that the case was not argued in the Court below, as it certainly does not appear to have been argued, upon the ground of there being no evidence of *Bennett* ever having

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possession of those shares. Upon the other hand it is not stated (which is the only point of any consequence arising as to the non-production of *Bennett* as a witness before the Court) whether or not anything could be elicited from him as to his not having due notice of the payment of those shares in compliance with the statute. That is got rid of entirely, because, as Mr. *Millar* very fairly stated in his reply, they did not assert, and did not wish to assert, that *Bennett* had such notice. Now, my Lords, every circumstance in the case militates against the notion of this case having been heard in the Court below with that point of serious controversy between the parties. If there was a desire for raising that controversy, the proper moment would have been upon the application for leave to appeal, when the Court, as a condition of giving leave to appeal, would raise that question whether or not Mr. *Bennett* took the ordinary precautions which prudent purchasers would do in obtaining the certificates.

My Lords, that difficulty being got over there remains nothing else in the case. Reference was made yesterday to a case which decided that it is not the duty of a purchaser, if there is nothing to raise his suspicions (it is of course his duty if there is anything to raise his suspicions, but not otherwise), to make complete researches, which he would indeed find great difficulty in bringing to a satisfactory solution, as to whether the certificates handed to him representing a given state of things were true. It is much more expedient for the general safety of mankind that the persons whose duty it is to make full, true, and correct representations of this nature should be assumed to have so made them, and should not be at liberty to dispute them, than that the person to whom they are made should be bound to bestir himself to ascertain whether those representations are truly and justly made.

My Lords, in this case before us we have the great satisfaction, which we have not always in cases relating to public companies, of being able to say that, so far as we can see, throughout the whole course of the proceedings there is nothing whatever to cause the least suspicion or question as to fraud in any of the transactions which have taken place. What has taken place is that a certain payment is made in fully paid-up shares. Nobody disputes the value of the property—nobody raises the question of money

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having been given in excess of what the property was worth, or of any underhand bargain between the vendor and the purchaser of this property having been made. Property is handed over to the company, which still seems to have been, at the very moment of winding up, in possession of it; and all this being perfectly straightforward, the only question argued, (and it is a fair question to argue, although I cannot accede to the view of the Appellant upon the subject,) was, whether or not the statute, having said that every share issued should be issued and held subject to payment in cash, prevents the operation of this estoppel, as against the company, so as to preclude the representation that the shares which were described as fully paid up, were not, in fact, fully paid up in cash according to the exigencies of this section of the statute. Mr. *Dickenson* put it in this way: he said, True it is that we represented that the shares were fully paid up, but we did not represent that they had been fully paid up in cash, and therefore, considering that this section of the statute existed, it was your duty to ascertain whether or not the payment had been made in the manner therein prescribed. My Lords, I presume that is not so; the representation is made that the shares are paid up, and the vendee to whom that representation is made is entitled to say, I hold you to that representation which involves everything that is right and proper to be done. You say they are paid up, and you must mean to represent to me that they are paid up in the way in which they ought to be paid up, and I am entitled to take that representation of yours literally, and, having no reason for suspecting anything to the contrary, I have a right to say that in any contest which may arise between us, I must be taken to have held shares in your company as to which I am under no responsibility, because you inform me by your receipt itself that you are perfectly satisfied that these shares have been fully paid.

My Lords, it appears to me that the question itself in law is extremely clear, and I am glad we are able to dispose of it without any farther litigation between these parties. The question has been fully argued upon that ground, and decided upon that ground, and we are called upon now to reverse a judgment founded upon the solid ground which I have represented, namely, that the estoppel as between these parties prevented the company from

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saying anything to the contrary of what the documents had represented; and, for the same reason which led the Lords Justices in the Court below to come to that conclusion, I am of opinion that in this case the Appellant has failed to make out his case against the Respondent, and that therefore the appeal must be dismissed with costs.

LORD SELBORNE:—

My Lords, in the certificates issued by the company, in the register, and in the company's returns, these shares are uniformly and consistently represented as having been in fact paid up. The manner in which they were paid up is not of course mentioned in any of these documents, nor is there anything in any of them to shew or suggest that they were paid up in the sense of being agreed to be taken as paid up, without a cash payment, in virtue of a contract which ought to have been, but was not, registered. Any one, therefore, looking at the certificate in good faith—looking at the register or looking at the returns—would receive from them, at all events, no information that any question arose under the statute. The Respondent, whom I identify with the *cestui que trust* Mr. *Bennett*, is a person who is *primâ facie* in that situation. If Mr. *Bennett*, at the time of the transaction by reason of which he acquired his interests, saw the certificates, or the register, or saw the returns, he obtained that information; if he did not, then, of course, it may well be that he can get no benefit from the representations upon them, and there is no doubt that, upon the question whether he did or did not see them, the burden of proof was strictly upon the Respondent. But then, my Lords, it is equally certain that although the burden of proof upon that point was strictly upon the Respondent, the official liquidator, unless he had reason to believe that in point of fact the certificates remained with *Goulton*, or with the company, and were not produced to *Bennett* or to Mr. *Radcliffe* his solicitor, when the sale by *Bennett* to *Goulton* was completed, not only might, consistently with his duty, but probably would, in the due discharge of his duty, so conduct the litigation as to relieve the Respondent from the burden of producing to the Court, and relieve the Court from the necessity of requiring, strict and formal proof upon that subject; because it is no part of the

duty of an official liquidator to create expense by insisting unnecessarily upon strict and formal evidence as to matters of fact which are not really and truly in controversy between the parties.

Now, my Lords, bearing that in mind, it appears to me that we have only to look at this case in any other light than that of the strict technical *onus probandi*, in order to see that the presumption of fact that these certificates must have been handed over, or at least produced, to Mr. *Bennett*, or to Mr. *Radcliffe*, was really irresistible, unless the official liquidator knew, or had reason from matters within his knowledge to believe, something to the contrary. Because, my Lords, how does the matter stand? The sale by *Bennett* to *Goulton* was at least (so far as the shares were concerned, there is nothing whatever to suggest a doubt of it) a *bonâ fide* transaction for value, and if it had been meant to suggest anything to the contrary, on that point at all events, the burden of proof lay upon the official liquidator. If *bonâ fide*, it would naturally be conducted in a proper way according to the ordinary course of business, and if so conducted, the certificates would as a matter of course be produced, and as a matter of course handed over.

More than that, my Lords, a regular solicitor, Mr. *Radcliffe*, against whom nothing is suggested, acted in the transaction both for Mr. *Bennett* and for Mr. *Nicolls* as trustee; it was his obvious duty to call for the certificates, to see them, and to compare the numbers in the transfer, no doubt taken from the certificates, with the certificates; and to take care that they went into the proper custody. In the absence of anything to the contrary, the presumption must be that he discharged his duty; and although that might not in strictness, if the matter had been in controversy, relieve the Respondent from the necessity of producing the best evidence of those circumstances, which would be the evidence of Mr. *Bennett* himself or of Mr. *Radcliffe*, yet if the official liquidator had no reason more than your Lordships have to doubt that the transaction proceeded in the ordinary course of business, he cannot be supposed to have believed that it did not so proceed, and therefore he had every motive for conducting the case reasonably and inexpensively, and for not putting his opponents to what, in that point of view, must have been an entirely unnecessary expense.

If, on the other hand, my Lords, he had any reason to believe

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that this transaction had not proceeded in the regular and ordinary course of business, or that as a matter of fact the certificates had not been produced or handed over, then, my Lords, it is quite certain that, although the *onus probandi* lay strictly upon the other side, he would have put the Court in possession of his grounds for that belief, and the fact that he did entertain it. But he does not do anything of the kind. The two *Goultons* are for other purposes used by him as his witnesses, and whether they were more or less trusted by him, more or less friendly or adverse, it is certain he had the means of putting the Court in possession of whatever they were prepared to state upon the subject. He does not do so—he is informed of that passage in the affidavit of Mr. *Nicolls*, which no doubt is not evidence of the fact, that Mr. *Nicolls* had been told by Mr. *Bennett*, not merely that Mr. *Bennett* had the certificates, but that Mr. *Radcliffe*, as his solicitor, had given a notice which it would be very proper for Mr. *Radcliffe* to give to the company, to secure Mr. *Bennett* against any transfer which ought not to be made. That notice, in the ordinary course of things, would be in writing, and if the official liquidator in his own mind doubted, or had any reason to doubt, that such a notice had been given, or that the certificates had been so handed over, at least he could have searched for such a notice, and have informed the Court that he found none, and he might at least have heard what the *Goultons* had to say on the subject, and laid before the Court on that point all that he could. But he does none of those things. From beginning to end of the evidence, and in his own case presented to your Lordships, and in the affidavit on which he gets leave to appeal, there is a total absence of any one single thing pointing to the notion that this question of fact was every really in controversy.

And then, my Lords, it is admitted that, when the case came before the Lords Justices of Appeal, their Lordships in effect called upon the official liquidator to act impartially in the discharge of his duty, by putting the Court in possession of all the facts within his knowledge, and did so evidently to prevent unnecessary controversy on questions of fact, and that upon that occasion he did actually produce the book containing the counterfoils, shewing that certificates admitting the payment in full of these

particular shares had been issued by the company, no doubt to *Goulton;* and I think that the statement of counsel on both sides must have satisfied your Lordships that the matter was left practically there. The Lords Justices being entitled, from the way in which the argument before them was conducted, to assume that there was no farther controversy between the parties upon the question whether the certificates actually reached the purchaser, Mr. *Bennett*, or not, I am convinced that, if at that time it had occurred to the counsel conducting the official liquidator's case, that there was a serious question of fact as to the delivery over of those certificates to Mr. *Bennett*, the counsel neither would nor could have omitted to urge upon the Court to look at the state of the evidence, and see that there was no evidence upon the subject, in which case the Court would doubtless have given an opportunity to supply any defect of evidence. If that had been done the three Lords Justices could not possibly every one of them have treated this fact as a fact established, and not in controversy, as they did in their judgment.

My Lords, I am therefore clearly of opinion that your Lordships would greatly fail in your duty if at this stage of the case, when the power of admitting this new evidence without sending back the case to the Court of Chancery can no longer be exercised, you permitted an afterthought, which has occurred, I verily believe since the decision of the Lords Justices, to the minds of the advisers of the official liquidator, which certainly there is no trace of as having made a serious part of the controversy before, to be brought forward now at this late stage of the case.

My Lords, upon the question of law I have nothing to add to what has been said. It appears to me that the Lords Justices deal very fully, very satisfactorily, and very rightly with that question, and it is clearly your Lordships' duty to affirm their judgment.

LORD BLACKBURN :—

My Lords, I am of the same opinion. The 25th section of the Act of Parliament in question, though not worded perhaps quite as I think it might have been worded, clearly means no more than this: that no contract by which shares shall be considered

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as duly paid up when they are not in fact paid up, shall be valid unless it be registered; and that when there is no such registered contract, the shares are to be payable in cash. More than that I do not think it means.

Now, my Lords, in the present case there is no such registered contract, and consequently the shares are payable in cash, but then the section does not say that that is to be conclusive against everyone, nor, as it was argued, that any one who has become a shareholder under any circumstances shall be compelled to pay them up in cash. That is not the statute. These shares were bought, and the liquidator may require payment of the calls, unless either it be proved that they were paid in cash, or circumstances have arisen which render it unnecessary to prove that. The present case is of the latter description. Now sometimes there is a degree of odium thrown upon the doctrine of estoppel, because the same word is used occasionally in a very technical sense, and the doctrine of estoppel *in pais* has even been thought to deserve some of the odium of the more technical classes of homologation. But, the moment the doctrine is looked at in its true light, it will be found to be a most equitable one, and one without which, in fact, the law of the country could not be satisfactorily administered. When a person makes to another the representation, "I take upon myself to say such and such things do exist, and you may act upon the basis that they do exist," and the other man does really act upon that basis, it seems to me it is of the very essence of justice that, between those two parties, their rights should be regulated, not by the real state of the facts, but by that conventional state of facts which the two parties agree to make the basis of their action; and that is what I apprehend is meant by estoppel *in pais* or homologation. But whether the term be used in its more or less technical sense, I take it that one common idea runs through the whole, namely, that your rights, as between yourselves, must be regulated upon the basis that that is accurate which you induced the other side to take as the basis upon which he was to act.

Now in the present case the company has issued under the seal of the company a certificate in the form which is set out in the case, in which the company has asserted that these shares have

been fully paid up. These certificates are issued under the directions of the Act of Parliament, and are made *primâ facie* evidence of all that they state; only *primâ facie* evidence. The certificates are given and issued for the very purpose of enabling the person who holds them to go to others for the purpose, amongst others, of selling the shares, and to say: "Here is the certificate; you see I am a shareholder, as the company has so certified it. Act upon that, and bargain with me upon the supposition that I am." That is the very object with which they are issued under the company's seal. Now when the company has so issued the certificate under the company's seal to enable a person to induce others to buy the shares, and more especially when the company has registered the transfer solely in consequence of that, it would be in the highest degree an injustice to say that the company shall, as against that person, be permitted to say, There was a mistake or inaccuracy in the representations that the shares have been fully paid up. You would be fully entitled to say as against everybody else who had acted upon it that it worked an estoppel. I think the liquidator would be exactly in the same position.

But in the present case the liquidator makes an affidavit in which he says that in point of fact these shares in *Goulton's* name, or in *Goulton's* nominee's name, had never been fully paid up in cash, and that the contract has never been registered, therefore that puts an end to the *primâ facie* matter of evidence as far as *Goulton* is concerned. He farther states that he finds in the record that *Nicolls* is registered as the owner of the shares, and I think that makes it enough of a *primâ facie* case to say you must explain how you have not paid cash upon these shares. *Nicolls* does proceed accordingly to give his explanation and to state how it was. He tells us in his affidavit that he had never any beneficial interest in these shares at all. He explains how he came to take them by saying that there had been a sale, and that he had sold some land to *Bennett;* that *Bennett,* at a very considerably advanced price, sold it to *Goulton,* and that part of *Bennett's* contract with *Goulton* was that he was to be paid £5000 in cash, and £1000 in fully paid-up shares of this company. He proceeds to say, that in November, 1874, he executed a conveyance to *Goulton,* and was paid the price for which he had sold the land to

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Bennett. He tells us that at the time he executed these deeds (he does not say it in so many words, but in effect) one of the deeds which he executed was an acceptance of the transfer of the 200 shares into his name. At the time of signing he did not know, or if he did know it, he had forgotten, that he had executed the transfer; but some time afterwards *Goulton* came and told him that these shares stood in his name, and *Nicolls* added in explanation that they were *Bennett's;* and he makes the statement in his affidavit that he was subsequently told by *Bennett* not only that he, *Bennett,* had the certificates, but that his solicitor, Mr. *Radcliffe,* had given notice to the company that they were not to part with his shares, as they belonged to him and he held the certificates. Now, it is not disputed that *Bennett* really had such certificates purporting to shew that the shares were fully paid up. It is exceedingly probable, in the ordinary course of business, to say the least, that when the contract was made for the fully paid-up shares to be delivered over, these certificates would have been produced and handed over to Mr. *Radcliffe,* the solicitor. Nevertheless, I quite believe that on these affidavits as they stand the evidence is not in a very satisfactory state upon this question. Without saying that there was no evidence of the fact, yet if the Court of first instance had found that the now Appellant, the liquidator, challenged the statement and asserted that it was not the case that *Bennett* had ever seen the certificates, or that it was his wish to have that fact more satisfactorily proved, I cannot doubt that the Court would have said, "Whether it is satisfactorily proved or not, it shall be farther investigated if you really seriously dispute it." But I cannot find that anything of that kind was said or done before the Court below. The imperfect evidence was allowed to stand; and I must say I think the Court of Appeal, not being asked to have any farther evidence upon the question, was justified in inferring that the *primâ facie* presumption which would arise from the facts imperfectly proved—namely, that the share certificates were handed over to *Bennett*—was not in dispute; and I think it is too late to set up the contrary now.

My Lords, as for the rest, when once that conclusion is come to, it comes really to this, Is the trustee, whose *cestui que trust, Bennett,* did, by the faith of this representation, so become a shareholder,

entitled to an estoppel as much as if *Bennett* had had the shares transferred into his name? It does not seem to me to require argument to shew that that point, which really is the point which has been argued, is not doubtful.

LORD GORDON entirely agreed that the judgment of the Court of Appeal must be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 12th July, 1878.

Solicitors for Appellant: *Bischoff, Bompas, & Bischoff.*
Solicitors for Respondent: *Guillaume & Sons.*

[HOUSE OF LORDS.]

THE DIRECTORS, &c., OF THE LONDON AND NORTH-WESTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

SYDNEY EVERSHED . . . . . RESPONDENT.

Railway—Inequality of Charges—Undue Preference—Toll—Money had and received.

The 90th section of the 8 & 9 Vict. c. 20 (*Railways Clauses Consolidation Act*, 1845), requires equality of tolls for similar services rendered by railway companies to all persons; and s. 2 of the 17 & 18 Vict. c. 31 (*Railway and Canal Traffic Act*, 1854), forbids the giving of any undue or unreasonable preference or advantage to any particular person or company. A charge made by a railway against *A.* for services rendered by that company to him must not, therefore, be greater than the charge made by the same company against *B.* for rendering him services of the like nature.

E. was a brewer at the town of *B.*, where three railways had their stations With one of these railways, *M.*, certain brewers in the town had direct communication by sidings, which enabled goods to be sent to the trains, and taken from the trains of Railway *M.* with greater ease and less loss of time than by the way of ordinary cartage. *M.* charged them nothing for cartage, and made a rebate in the charge for station to station conveyance. These brewers had no such communications with Railway *N. W.*, but it was often

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convenient for them to send by that railway; and the directors of that railway, in order to compete with Railway *M.*, allowed these particular brewers the same advantages as to cartage and rebate as Railway *M.* did. As to all others in the same trade (*E.* among the rest), the directors of Railway *N. W.* made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line:—

Held, that this was an inequality and an undue preference within the meaning of the statutes.

Where *E.*, one of the persons thus paying the higher rate, had for some time paid it in ignorance of the facts, but afterwards, on finding that he was subjected to this higher charge, paid it under protest:—

Held, that he was entitled to recover back, in an action for money had and received, the difference he had so paid under protest.

APPEAL against a judgment of the Court of Appeal, which had affirmed a previous judgment of the Queen's Bench Division in an action brought by *Evershed*, the now Respondent, to recover a sum of £1356 for overcharges alleged to have been made by the present Appellants in respect of goods carried by them for him.

When the case came on for trial before Mr. Justice *Field*, it was agreed that it should be referred to a barrister, Mr. *Cave*, to state a Special Case for the opinion of the Court. The material parts of that Case were these (1):

There were three railway companies having stations in the town of *Burton-upon-Trent*, by any one of which goods could be sent from *Burton* to any part of the *United Kingdom*. Messrs. *Truman* and Messrs. *Ind & Coope* and Messrs. *Phillips* were brewers at *Burton*. The Plaintiff, *Evershed*, was also a brewer there. Messrs. *Truman* (who had become owners of the business of Messrs. *Phillips*), and also Messrs. *Ind* had communications by sidings between the *Midland Railway* and their own premises. *Evershed* had no such communication with any line of railway in *Burton*. By the use of these sidings the goods of these two firms could be transferred from the breweries of these firms to the railway line at less cost of time and labour than from the premises of those brewers who had no such advantages. These latter had to pay a cartage rate for bringing their goods from their premises to the line of railway. To the brewers who did possess these advantages the *Midland*

(1) The facts of the case are fully detailed in the reports in the Court below, 2 Q. B. D. 254 and 3 Q. B. D. 135; a short summary of them is all that is here necessary.

Railway directors charged no cartage; and, besides, allowed a rebate of 9*d.* per ton from the carriage rate of the goods, or what was called the "station to station" rate. There was no direct communication by sidings between the *North-Western Railway* and the two firms, but when their goods were sent to that railway, though the cartage work was done for them, there was no charge made for cartage, and the same rebate in the station to station rate was made, as when they were sent to the *Midland Railway*. In some instances, but not in all, it was more convenient for these firms to send by the *North-Western* than by the *Midland Railway*, and with a view to a successful competition with the *Midland Company* (but without any intention to prejudice the Plaintiff) the *North-Western* directors exactly assimilated, in favour of these two firms, their charges to those of the *Midland*. To the other brewers in the town, of whom Mr. *Evershed* was one, the ordinary charges for cartage were made, and no rebate was allowed of any kind upon the station to station rate. For a long time the traffic business of these other brewers was managed by a man named *Ball*, who, it was said, for his own purposes, kept the persons employing him in ignorance of these differences of charges. *Ball* was dismissed in September, 1874, but for some time afterwards *Evershed* continued the payments as before. On the 7th of January, 1875, the Plaintiff wrote to the Defendants, stating that he had become acquainted with the differences, and complaining of them, asked for repayment of the amounts which he alleged had been overcharged. Up to July, 1875, he still made the payments, but made them under protest. His demand was followed by a complaint to the Railway Commissioners, who, acting upon that complaint, issued their injunction forbidding the railway company to continue to make the differential charges. The Defendants acted on that injunction, and had, in consequence, lost much of the outward traffic of the firms before mentioned. The Plaintiff afterwards brought this action for money had and received, to recover what he alleged to have been unlawful overcharges.

The question for the Court was whether the Plaintiff was, under the circumstances, entitled to recover the whole or any part of the alleged overcharges. The Court was to have power to draw inferences of fact.

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The Special Case was heard in the Queen's Bench Division on the 19th of July, 1877, and on the 2nd of February judgment was given for the Plaintiff, which judgment was, in November, 1877, affirmed by the Court of Appeal. This appeal was then brought.

Mr. *Mellor*, Q.C., and Mr. *J. S. Dugdale*, for the Appellant:—

The intent of the Legislature in passing these provisions, which are known as the inequality clauses, was to prevent unfair dealing—a favouritism to one man and undue charges upon another. But the Legislature never intended that, where a railway company had a fair ground for making a distinction between two sets of customers, the two should, merely because they were customers, be treated exactly alike. If one set of customers had premises immediately adjoining the railway, and gave very little trouble in getting the goods into the trucks of the train, or actually performed the work of putting them there, it never could have been meant that they whose warehouses were at a considerable distance from the railway, and who therefore occasioned a delay in collecting the goods, and gave much trouble in getting the goods into the trucks, should be treated exactly like the other. If not, that established the principle that different circumstances justified difference in charges; and provided that nothing which all men would describe as unfairness, was practised, the matter was left to the discretion of the company. The Defendant company here had no intention to injure the Plaintiff, but his premises were not as conveniently situated as those of the two firms, all of which would send by the *Midland* if they did not get some advantage from the *North-Western*, which, therefore, was entitled to do what it could to protect itself against what might otherwise, in this particular instance, be a destructive competition. This it had a right to do. The Plaintiff could not, in fact, be said to have been injured, for if the same charges that he was required to pay had been demanded against the two firms he would have been in exactly the same condition as now. He would merely have succeeded in making the railway company lose a good deal of carrying business, but he would not have benefited himself in the least.

The word "toll" in the 90th section of the 8 & 9 Vict. c. 20, could not be said to include the cartage of goods to the station.

It described the payment for conveying them, or allowing them to be conveyed along the line of the railway. That was clear from all the expressions used in that statute, sects. 90 to 97 inclusive, and from the interpretation clause itself: *Wallis* v. *The South Western Railway Company* (1). If, therefore, the owners of the goods brought them to the railway in their own carts, and by the labours of their own men, and were consequently not charged for cartage, there was nothing to shew that the word could be so applied as to make unlawful a charge for cartage, made in the case of others who used the company's carts and the company's servants for those purposes. When, therefore, the statute was appealed to for the purpose of shewing that the tolls for the conveyance of the same classes of goods must be the same for all persons, it was clear that that would have no application to a case like the present, where the money paid was for cartage of the goods to the station, for the purpose of being conveyed on the railway, and for putting them into carriages for conveyance on the railway.

The case of *Strick* v. *The Swansea Canal Company* (2) shews that there may be a right in a company to charge different rates against different persons where the services rendered to them are different. What did the Railway Acts intend to prohibit?—the charging of an undue or an unreasonable toll. But that very restriction shewed that in making the charge circumstances were to be considered, for otherwise how could it be determined what was an undue or what an unreasonable toll? The enactment itself proved that a preference might properly be given, if varying circumstances required it. There may be no case which directly so determines, but there are many expressions of judicial opinion in different cases, which indicate that a company may make differences in its charges under varying circumstances. In such cases the fair interests of the railway company are to be taken into account: *Ransome* v. *The Eastern Counties Railway Company* (3); *Baxendale* v. *The Great Western Railway Company* (4); and especially *Nicholson* v. *The Great Western Railway*

(1) Law Rep. 5 Ex. 62.
(2) 16 C. B. (N.S.) 245; 33 L. J. (C.P.) 240.
(3) 1 C.B. (N.S.) 437; 26 L.J. (C.P.) 91.
(4) 5 C. B. (N.S.) 336; 28 L. J. (C.P.) 81.

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Company (1). It may be that a mere threat to make a private tramway, which should make the use of the railway unnecessary, would not justify a difference in charges: *Harris* v. *The Cockermouth Railway Company* (2); but that case is inapplicable here, for here the difference of accommodation does actually exist, and therefore the other cases which allow a railway company to make differences under peculiar circumstances are those which are to be acted on.

As to the form of the action, the Plaintiff was bound by the conduct of his own agent; and when that agent ceased to act for him he continued to make the same payments as before, and let the whole matter go on until by the lapse of time he had lost his right to recover. And after paying with knowledge of the facts, as he had done here, he could not maintain money had and received to recover what he now asserted to be overcharges. The circumstances were not the same as in *The Great Western Railway Company* v. *Sutton* (3) and *The Lancashire and Yorkshire Railway Company* v. *Gidlow* (4), for there the payments had been made under the compulsion of circumstances (5). Here they were made voluntarily.

Mr. *Wills*, Q.C., and Mr. *C. Gould*, for the Respondent, were not called on to address the House.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, this is an appeal from a unanimous decision of the Queen's Bench Division, and also of the Court of Appeal, and I cannot think that your Lordships have heard anything in the argument for the Appellants which can raise a doubt in your minds as to the correctness of those decisions.

I do not propose to go over the whole of the ground which has been so completely covered by the judgments of the Courts below, I will simply make this observation: It appears to me that the question, in cases like the present, must always be simply this: Is the Plaintiff in the action obliged to pay one sort of remunera-

(1) 5 C. B. (N.S.) 366; 28 L. J. (C.P.) 89.

(2) 3 C. B. (N.S.) 693; 27 L. J. (C.P.) 162.

(3) Law Rep. 4 H. L. 226.

(4) Law Rep. 7 H. L. 517.

(5) *Per* Lord *Chelmsford*, at p. 527.

tion for services which the railway company performs for him, while the company performs the same services for other traders either for less remuneration, or for no remuneration at all? My Lords, in my opinion undoubtedly the railway company is, and that indeed is not disputed, in the collecting, loading, and delivering of goods, performing identically the same services for the Plaintiff in this action as for the two other firms of brewers whose names have been referred to. Now as a matter of policy and expediency, it may well be that the Appellants have good reasons for treating those other firms in the way they do; it may be that if they do not do that these other firms, from the natural advantages of the situation which they have been able to occupy, will send their goods by another railway and not by the railway of the Appellants. But with those considerations the Plaintiff in the action has nothing whatever to do. That is exactly one of those things which Parliament has not left open to railway companies to judge of—whether in that way they will equalise their capacity for competing with other lines or not. The one right, to my mind, the clear and undoubted right, of a public trader is to see that he is receiving from a railway company equal treatment with other traders of the same kind doing the same business and supplying the same traffic. In my opinion that is not the case with regard to this Plaintiff, and therefore I think he is entitled to recover the moneys he has paid under protest.

My Lords, I move your Lordships that the judgment of the Court below be affirmed, and the appeal dismissed with costs.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion. I have been unable to see, since the beginning of the argument, in a case where there was this difference in the charge against the Respondent, how it could possibly be said that the case comes within the well-established construction of the provisions of the 90th section of the *Railways Clauses Consolidation Act.*

It was said indeed, and pressed on us by Mr. *Mellor*, that in the 17th paragraph of the Case which has been stated for the opinion of the Court below, the Appellants are stated to perform "gratuitously" the cartage which they perform for the three firms; and

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it was argued that the Plaintiff in the present case, Mr. *Evershed*, could have no reason to complain because they were bountiful to others whilst to him they made this charge, and still less (it was said) could he recover from them what he has so paid as money obtained from him unduly, and for which he could sue in an action for money had and received. I apprehend that the real state of the facts appears clearly from the Special Case, and however the word "gratuitously" may be applied there (and it seems to be applied not perhaps unnaturally) the result is this, that in making the total charge for the total work, done in exactly the same circumstances in every respect, except that the one class of people happen to be near to a rival railway, and therefore might be tempted by some offer to hand over their business to that railway, the one brewer is charged 1*s.* 9*d.* more than the others. If that be so, surely he has the right to sue for it, in whatever form the arrangement may have been made as between the company and the others, the favoured individuals, because that arrangement comes in effect simply to this: We charge other people a lower sum of money, and we charge you a higher sum of money. But according to the strict meaning of the Acts of Parliament, as interpreted by the decisions, from the very moment that the company charges *A.* a given sum, when *B.* another person (a mere stranger up to that time, if you will), comes to the company to have the same services rendered under the same circumstances, he cannot be charged one farthing more than has been charged to *A.*; he can only be charged precisely what the Act authorizes the company to charge, namely, that which has been charged to others, and the moment the directors take on themselves to charge less to another person, they must charge less to him too. The charge must be the same to all for the same services, performed in the same manner, for carrying the goods for the same distance, and for similar services rendered in every other way; it not being a case of a wholesale charge compared with a retail charge and the like, which would be a difference of circumstances, and has been decided to be an essential difference.

My Lords, in the case we have before us, there is really no essential difference of circumstances; the only difference is that the two firms of brewers are more favourably situated for dealing

with another railway company than the other brewer is. Therefore, I apprehend that your Lordships cannot possibly say that the Appellants are entitled to make this distinctive charge and give to other traders a rebate without giving the Respondent a return of the money which he has so paid in excess of the charge to other people. I think the money he has so paid, and paid under protest, can now be recovered back by him.

LORD BLACKBURN :—

My Lords, I am of the same opinion.

The 90th section of the *Railways Clauses Consolidation Act* says, in what seem to me very clear terms, that "all such tolls" shall "be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods, or carriages of the same description, and conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances." I can hardly conceive clearer words than those to express the intention of the Legislature that there should be equality of charge in respect of all goods carried upon the same railway under the same circumstances. It may very well be that peculiar circumstances, as in some of the cases which have been referred to, make some difference. There may be the difference between wholesale and retail; a large quantity of goods may be carried cheaper than a smaller quantity of goods; that would be a difference of circumstances. And many other cases may be pointed out in which the circumstances would not be the same.

But the argument here has been almost entirely this, that because the two firms of brewers who have been mentioned happen to be so situated as to the *Midland Railway* that they can get cheap carriage by the *Midland Railway Company*, and consequently will not go to the *North Western Railway Company* if the *North Western Company* charges them the ordinary rate, therefore, because there is that difference in the persons, the *North Western Railway Company* may reduce the price to them in order to tempt them to bring their traffic to that company. I quite agree that this is not done with any view of injuring, or intention to injure, Mr. *Evershed*. It is done with a view to coax some of the traffic,

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which would otherwise go upon the *Midland Railway*, to come to the *North Western Railway*. It may be (but I do not give any opinion as to that) that it would have been provident and proper on the part of the Legislature, in making the enactment, to say that there should be an exception in such cases, and that there might be a different rate given in order to coax and induce traffic to go by a different route from that by which it would otherwise have gone. However, whether that would have been a prudent and proper thing for the Legislature to say or not, it is not what the Legislature has said, and it is very likely that it was the intention of the Legislature not to say it, because it was thought that if equality of charge is to be disregarded under *any* circumstances, that might be made a cloak for making inequalities of charge under unjustifiable circumstances. I do not know whether that was the motive and intention of the Legislature or not, and I do not inquire. What the Legislature has clearly said is that the tolls must be charged equally to all persons under the same circumstances. I think that means under similar circumstances as to the goods, not as to the person. I do not think the person comes into the question at all.

My Lords, there is one more argument, and one more only, which has been used. It was said that the word "tolls" in the interpretation clause is confined to a charge authorized by the Act of Parliament for carrying goods on the railway, from the time the goods are put on the railway, that is to say, from the time they are brought to the railway station, to the time when they are delivered, and that the shilling which has here been paid for the cartage outside is not a "toll" within the meaning of the Act. I do not think it is in the least degree necessary to consider whether that is so or not. I think it is quite clear that when the charge from station to station, and a shilling, are, both together, paid by one person for the whole service performed by the railway company including the cartage, when the amount of the tolls (supposing them to be exclusive of the cartage), and an added shilling are charged to one person, and to another person the same tolls (again treating them as exclusive of the cartage) are charged, and a shilling's worth of cartage is thrown in gratis, and not charged for, this latter person gets his goods carried upon the railway at a

cheaper rate. Whether the shilling is part of the "toll" or not I do not care. In that case there is an inequality; there is a difference in the amount charged for carriage upon the railway which is what the Legislature intended to prevent.

As regards the only remaining question, namely, whether an action for money had and received is the proper remedy in such a case, I apprehend, my Lords, that that question was settled by the decision in *The Great Western Railway Company* v. *Sutton* (1), and *The Lancashire Railway Company* v. *Gidlow* (2), where it was determined, as I understand it, that money extorted by inequality of charge was to be recovered in exactly the same way as if it had been money extorted by making an unreasonable charge, that is to say, by an action for money had and received.

LORD GORDON:—

My Lords, I am of the same opinion.

This Act, the *Railways Clauses Act* of 1845, has given rise to a good deal of discussion and litigation, and I do not wonder at it altogether, considering the peculiarity of the terms which are used in what is called the equality clause, the 90th section. The words in the section, "under the same circumstances," are certainly words calculated to give rise to a good deal of litigation in their construction; but we see how very carefully the learned Judges in the Queen's Bench Division and in the Court of Appeal applied their minds to it, and we find that they are unanimous upon the point. I listened with every attention to the arguments submitted to us by the Appellants' counsel, but I must say that they failed to bring before my mind distinctly any good grounds of complaint against the judgments of the Courts below. I therefore think that the judgment ought to be affirmed.

Judgment appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 15th July, 1878.

Solicitor for Appellants: *R. F. Roberts.*
Solicitors for Respondents: *Dobinson, Geare, & Son.*

(1) Law Rep. 4 H. L. 226. (2) Law Rep. 7 H. L. 517.

[HOUSE OF LORDS.]

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THE THARSIS SULPHUR AND COPPER COMPANY . . . . . } APPELLANTS;

M'ELROY & SONS AND OTHERS . . . RESPONDENTS.

Contract—Extra Work—Written Order—Acquiescence.

A contract for the construction of large iron buildings for a lump sum, contained a clause, *inter alia*, that no alterations or additions should be made without a written order from the employers' engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specified weight, and subsequently they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorizing interim payments. On the completion of the work the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied:—

Held, reversing the interlocutor of the Court below, that the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract.

IN 1872 the Appellants, the *Tharsis Sulphur and Copper Company*, had occasion to erect additional works at *Cardiff* for the purpose of calcining and precipitating the ores produced from their mines in *Spain;* and for this purpose they entered into a contract with the Respondents, *M'Elroy & Son*, engineers in *Glasgow*, to furnish and erect all the iron and general work for a lump sum of £25,000. The terms of the contract were embodied in a formal deed in May, 1873, and contained, *inter alia:*

Article 12. The company reserve power, during the progress of the work, to make any alterations, additions, or deductions, or to vary from or alter the plans or materials as they may consider advisable, without in any respect vitiating this contract. This shall only be done under a written order from the company's engineer, and allowance will be made for such alterations at the rates in the schedule. The contractors shall not at their own hand, or without a written order from the company's engineer, be entitled to make any such alterations or additions, and no allegation by the contractors of knowledge of, or acquiescence

in, such alterations or additions on the part of the company, their engineers or inspectors, shall be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations or additions.

Article 18. . . . . and with regard to payment it is stipulated as follows:— First, in the case of the works at *Cardiff* no payment shall be held as legally due until the contract is completed, but advances shall nevertheless be made to account thereof, under the engineer's certificate, in amounts of not less than £500 upon work actually done, after deduction of 10 per cent., which deduction shall be paid at the end of the term for upholding the works, providing there is no outstanding claim against the contractors for penalty for breach of contract or neglect in upholding the works. Second, in the case of castings payments will be made upon the delivery of every twenty-five tons of castings, but the company will retain in their hands, until the completion of that part of the contract has been certified by their engineer, the value of twenty-five tons of castings, which is to be paid over to the contractor on completion of said branch of the contract, less any deductions that may be required to cover any costs, expenses, or charges that may have arisen by reason of the contractor's neglect of, or non-compliance with, the specification or contract; declaring that the weights given in the table appended hereto are only approximative, and that the company will not be bound to pay for any metal in excess of the thickness shewn on the drawings, calculated at the rate of 40 lbs. per 144 cubic inches.

The contract was completed in 1874. Disputes however arose in adjusting the balance of the contract price due; and in 1876 the Respondents raised the present action for a sum of above £10,000 for extras and loss of profit; but in the appeal the question was narrowed to the sum of £1086 12*s.* 10*d.*, made up of two sums of £911 3*s.* 2*d.* and £175 9*s.* 8*d.* claimed as the value of extra weight of iron used in certain gutter-girders, and the extra cost of erecting them in their places respectively. These girders consisted of over 300 trough- or gutter-girders, and were required in the specification to be made of a specified weight. On experiment it was alleged by the Respondents to be impossible to cast the girders of the weight specified, and of this the Appellants' engineer was informed, and a meeting took place between the parties, but as to what took place afterwards the evidence was rather contradictory. The Respondents alleged that the engineer orally agreed to the extra weights being supplied; that he afterwards certified in writing, that the extra weights had in point of fact been supplied; and they contended from this that his oral agreement and his written certificate, taken together, imposed on the Appellants an obligation to pay for the extra weight.

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The Appellants resisted the claim on the ground that they did not order, or desire, the extra weight; that it was unnecessary; that the girders could with care have been made of the specified thickness and weight; that no oral agreement had been entered into by their engineer for furnishing the additional material; and that although the engineer's certificates, issued solely for the purpose of authorizing interim payments, included as a matter of course the actual weight, this was not a written order such as was required under the contract.

On the 17th of November, 1877, the Second Division of the Court of Session (Lord *Gifford* dissenting), recalled the decision of the Lord Ordinary (*Curriehill*), holding that the Respondents were entitled to the claim, because that while parole consent by the Appellants' engineer might not be sufficient to entitle the Respondents to payment of the extra weight, the written certificate under the the hand of the engineer was sufficient evidence of a verbal contract previously made (1).

On appeal to the House,

The Lord Advocate (2) and Mr. *Benjamin*, Q.C. (with them Mr. *Darling*, of the Scotch Bar), appeared for the Appellants, and cited *Hill* v. *South Staffordshire Railway Company* (3); *Lamprell* v. *Guardians of Billericay Union* (4); *Erskine*, 3, 3, end of sect. 84.

Mr. *Southgate*, Q.C., and Mr. *Rhind* (of the Scotch Bar) appeared for the Respondents.

At the conclusion of the arguments on behalf of the Respondents their Lordships delivered judgment as follows:—

LORD CAIRNS, L.C.:—

My Lords, your Lordships have listened with great care to the exposition of this case, and it appears to me, and I think your Lordships take the same view, that when once the facts are really known, little or no difficulty arises as to the conclusion at which your Lordships should arrive.

(1) Scotch Cases, 4th Series, vol. v. p. 161.

(2) Rt. Hon. *W. Watson*, Q.C., M.P.

(3) Nov. 24, 1864; 11 Jur. (N.S.) 192.

(4) Jan. 30, 1849; 18 L.J. (Ex.) 282.

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My Lords, the Respondents in the case undertook to execute a certain work for the company who are the Appellants. That work consisted of the erection of a building, the structure being one which required to be made principally of iron castings. The work was to be done, and the castings were to be supplied by the Respondents, who are iron founders in *Glasgow*. The contract has been carefully scanned and brought before your Lordships. It is sufficient for me to say that, as I understand that contract and its construction, it was one which obliged the Respondents to execute the work which was contracted for, and if in the execution of the work the castings which were to be supplied (the castings, for example, for the girders), occasioned any difficulty in the work, if the girders had to be of a length different from what was specified or of a breadth different from what was specified, that was a risk which the contractors took; and they were obliged to execute the work with the necessary alterations in the size of the castings. There were provisions as clear as I have ever seen in any contract that no extra work, no work beyond that which was contemplated in the contract, was to be the subject of payment unless an order were given for that extra work by the agent, that is to say, the engineer of the company, in the form of a certificate under his hand.

Now what happened was this: the girders for the structure which I have referred to came to be cast by the Respondents, and it was found that if these girders were made of the thickness mentioned in the specification the result was that in the process of cooling they were liable to crack. There was a further difficulty, that in the process of cooling they were liable to warp and crack if they were made of the thickness, and not more than the thickness, mentioned in the specification. Now, so far as regards the Appellants it was clearly—of that there is no dispute—no object for them to have girders of a greater thickness than those which were mentioned in the specification; in fact so long as the girders were adequate to sustain the weight upon them, the less thick they were, and therefore the lighter the weight required to be placed upon the columns which were provided for them, the better for the Appellants. On the other hand, the Respondents were in this position: they were obliged to execute

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the work; as I understand the contract, they were obliged to execute it with the girders. If they could not cast the girders of the scantling, that is to say, of the exact thickness, mentioned in the contract, that was so much the worse for them. They ought to have known *that* when they undertook to execute the work in that form. Therefore they must have submitted to one of two things; either they must have refused to go on with the work, exposing themselves to the risk of being proceeded against for damages for not fulfilling their contract, or they must have increased the size, the scantling, of the girders to such an extent as would counteract the cracking to which the smaller scantlings subjected the girders.

My Lords, in that state of things meetings took place between the Respondents and their agents on the one hand, and the agents of the company on the other. It is not necessary to go through at length the evidence with respect to these meetings, for that has been very recently brought before your Lordships' attention; but the conclusion which I certainly draw from that evidence is this. In the first place there is nowhere here from beginning to end (this indeed is not disputed) any witness who says that any word was uttered, or any expression used, that could amount to a promise by the Appellants to pay for the increased thickness of the girders. Nor, indeed, was any expression used which amounted to an order given by the Appellants to make the girders thicker. There I entirely agree with the observations of Lord *Gifford* in the Court below. An "order" would mean an order by the company to the contractors to execute the work in the altered form. But the position of things was perfectly different, it was the contractors who were suggesting to the Appellants, if they were not requesting them, that the girders should be of a thicker form. It was, as I understand the case, and the evidence, a suggestion which was made for the benefit of the contractors, to enable them to execute the contract which they were bound to execute, but which they could not execute, except at very great expense to themselves, otherwise than by increasing the thickness of the girders. So far, therefore, as the matters stood, according to the evidence, before the time when the certificates which have been referred to were written, it appears to me that there is absolutely

no evidence of any verbal or parole contract between the Appellants, or any one representing them, and the contractors, that the Appellants would treat the increased size of the girders as extra work, and would pay for it accordingly. Therefore I am obliged upon that part of the case to dissent from the opinion of the majority of the learned Judges of the Court of Session.

Then, my Lords, if that is so, did anything occur afterwards which would amount to a certificate or a promise to pay for extra work? As to that I must say that it would be *à priori* in the highest degree improbable that, after what I have described took place, you would find that when the girders were made of the increased thickness, and so made for the benefit of the contractors, anything would be done subsequently to make the Appellants afterwards enter into an engagement to make a payment for extra work. But, my Lords, without dwelling upon the question whether or not there would be any consideration for such a promise under the circumstances, in point of fact I can find no evidence of any subsequent engagement. That which is referred to is the form of the certificates. That form, it appears to me, putting it at the very highest, is merely equivocal. It is consistent (the Respondents may say) with the existence of an antecedent agreement to pay for the increased thickness of the girders as extra work; but it is also entirely consistent with there being no antecedent agreement to pay for the increased thickness as extra work. The certificates I look upon as simply a statement of a matter of fact, namely, what was the weight and what was the contract price of the materials actually delivered from time to time upon the ground, and the payments made under those certificates were altogether provisional, and subject to adjustment or to re-adjustment at the end of the contract. I repeat, the utmost that can be said of these certificates is, that in their form they were equivocal and consistent with either view turning out to be the facts of the case; either that there was or that there was not a verbal agreement to pay for extra work. I am of opinion, upon the evidence, that there was no such verbal agreement, and therefore the certificates, in my opinion, cannot make better the case of the Respondents.

Therefore, my Lords, the learned Judges before whom this case

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came in the Courts below being virtually divided in opinion, because the Lord Ordinary and Lord *Gifford* were of the opinion which I have endeavoured to express, and the other two learned Judges were of a different opinion, I submit to your Lordships that the opinion of the Lord Ordinary and of Lord *Gifford* is the correct one and ought to prevail, and that this appeal ought to be allowed, and the interlocutor appealed against altered in the respect complained of. And, there being no appeal in regard to the costs in the Court of Session, that the Appellants should have their costs of this appeal.

LORD HATHERLEY:—

My Lords, I am entirely of the same opinion, and I confess that, having attended very carefully to the able argument of the learned counsel for the Respondents, I am quite at a loss to discover in any part of these proceedings anything approaching to an agreement entered into on behalf of the *Tharsis Company* by their engineer, the only person who was qualified under the contract to enter into such an agreement, still less of course any such agreement signed, although in the Courts below it has been thought that the certificates which were signed by the engineer (as they always are) might supplement that defect which would otherwise exist in the mode of ordering these matters with respect to which the complaint is made, that they are not allowed for as extra work. It was said that the certificate would supplement the defect of the order not having been signed, as being a subsequent ratification under the hand of the engineer. But, my Lords, I find, first no agreement, and secondly, supposing the words used in the interview which was held between four persons concerned in this matter, could possibly be construed into an agreement or anything approaching an agreement, I find nothing which could induce your Lordships to say that such an agreement can be considered to be confirmed by the writing of the engineer in the certificates subsequently given.

As to the alleged agreement itself, I am not going to read the evidence upon that subject. In reality it simply comes to this. Mr. *Dawson* is the only witness, I believe, who definitely uses the word "agreement," and he uses it in a very singular manner. He

is the only one who speaks decidedly and positively, and all he says is this. A conversation takes place, and he says that no objection was made by Mr. *Peter Stewart*, the engineer, to the greater thickness of iron being used; and I think in one part of his evidence he goes as far as to say that on one occasion he told them to use a greater thickness of iron. He does not say he told them that he would pay for it. He did not tell them it was to be considered as extra work, but he said, "If you cannot do it in one way, you had better do it in another." It amounts to this: "You have entered into an agreement with the company to do this work, and if you cannot do it in the manner specified, you must do it in the best way you can." It is quite plain that for the purposes of the *Tharsis Company* Mr. *Stewart* might say, "I want the girders of the length and thickness I have stated. I do not wish to have the girders thicker; I would rather not; but if you tell me that it will save you a great deal of money and expense, I do not wish to resist it. You are at liberty to make them thicker." But why he should *order* them to be made thicker, and thereby cause an extra weight to be imposed upon the building, it is scarcely possible to conceive.

Then, my Lords, things being stated by Mr. *Dawson* in the way I have described, he is asked, "What did you do after this 'agreement,' or something to that effect, between you and Mr. *Stewart?*" Now if there was any agreement at all, it was a kind of permissive agreement on the part of Mr. *Stewart* that the Respondents might depart so far from the specification for their own convenience and in order to save additional expense to themselves, but not subjecting the Appellants to a liability for extra work under the contract as to place this additional iron upon the work.

Then it is said that the subsequent certificates shew what was the intent of all parties in the interview which was held with Mr. *Peter Stewart*, and what is alleged to have been agreed upon at that interview, namely, the placing of additional iron on the work in question. It appears to me that the whole scope and intention of the certificates has been entirely misunderstood in this respect in the argument on the present occasion. The 18th proviso or clause of the agreement provided that the whole price of the

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works was to be £25,000 sterling; and then with regard to payment it was stipulated:

First. In the case of the works at *Cardiff* no payment shall be held as legally due until the contract is completed, but advances shall nevertheless be made to account thereof, under the engineer's certificate, in amounts of not less than £500 upon work actually done, after deduction of 10 per cent., which deduction shall be paid at the end of the term for upholding the works, providing there is no outstanding claim against the contractors for penalty for breach of contract or neglect in upholding the works. Secondly. In the case of castings payments will will be made upon the delivery of every twenty-five tons of castings, but the company will retain in their hands until the completion of that part of the contract has been certified by their engineer the value of twenty-five tons of castings, which is to be paid over to the contractor on completion of said branch of the contract, less any deductions that may be required

for any of the causes before assigned.

Now, my Lords, the function of a certificate of this kind, which is not by any means an uncommon instrument, is this. The engineer of the company is expected by the company to inform them whether they have sufficient value on their premises in the course of the execution of the contract, either in goods or materials supplied, or in the cost of working up those materials, which of course, renders them more valuable, whether there is sufficient in either of those forms to justify an advance. The certificate is not sent in as a bill for payment, there is no such bill at that time. The bill for payment is provided for in this agreement, as in most agreements of this kind which I have seen. The bill for payment is to be of the amount of £25,000, when all the work is done, subject to deductions. If extra work has been ordered the extra work will be added in a separate bill, and paid for by a separate payment. But when the company want to know whether or not they are in a condition to make an advance, they ask the engineer, what value have you got in the shape of materials or work, and can we make the advance?

My Lords, it is shewn very plainly indeed in this case, and in those very letters which were brought to your Lordships' attention, how these certificates work.

For instance, one letter dated the 9th of May, 1873, was quoted by Mr. *Southgate*, as referring to a certificate sent in in May. The letter is from the company to Messrs. *M'Elroy*, and begins:

Since you called here to-day we have seen our law agents, and ascertained that

the contract is now in order and the security conveyed to us. The only thing yet requiring to be done is the signing of the plans, which please call here to do on Monday. On the faith of this, we have asked our Mr. *Stewart* to make up a note of the amount you are now entitled to be paid, which we will pass before the finance committee on Monday, so that you may get your money on Thursday.

I agree in Mr. *Southgate's* view of that letter, that it refers to a certificate, which he finds dated the 5th of May, among those certificates which are furnished to us in the evidence. Your Lordships find that in the certificate dated the 5th of May, an account is made up including these "trough girders," as they are called, and the additional quantity of iron put into them is there included. All that is valued up, and the total reckoning brings up the amount to £2218 8*s.* 3*d.* as the sum which might properly be paid, if the company so thought fit, to the contractors. But they do not pay them that sum because those advances which are made are not advances by way of payment for the particular articles which are supplied; and accordingly, if you look at the certificate dated the 10th of May, in which there is a list of all the items on account of which a payment is made, and which is evidently referred to by the letter I have just read of the 9th of May, 1873, you will find a lump sum of £900 put down for these girders. The same course is followed in another letter which Mr. *Southgate* read of July, just in the same way there was a sum paid on account. It is not an exact sum made up by calculation of items, and by applying the prices to the quantities of articles supplied under those items—it is really simply nothing but this—it is an account sent in to shew that the company are quite safe in making such payment as they may think proper by way of advance, because there is now upon their ground property of such a value. As regards the iron, of course they had under that contract a peculiar stipulation, which I agree is an unusual one, and one which I have not seen before in other contracts, that they must always keep twenty-five tons of iron in hand in the form of castings before making any advance, and that at the end of the contract they would hand over to the Respondents the value of twenty-five tons of castings.

What is there, my Lords, in all that to shew that there was an

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agreement to pay to the Respondents for this additional weight of iron as extra work? The calculations and the certificates are made out in the same way as for all the other work under the contract—there is no extra pay-sheet for these things—what is there to shew that they were to be paid for as extras, or that there was any agreement by the company to that effect, or that Mr. *Stewart* had entered into any such agreement? If the Respondents had told him, We shall want so much more iron, and unless you give us leave (I look at it in that point of view entirely) to make these girders so much thicker, we cannot execute the work in the form and manner provided for in the contract,—and if he said I give you that leave,—then it would be consistent to say also, If it is to be paid for as such, the company may say that they will make an advance upon it. That would be consistent certainly, but there is nothing on the company's part to say, We, by making that advance, agree that you did that under an order by us and that you shall charge for it as extra work. What the company permitted the Respondents to do was only for their own convenience, and that being so, there is nothing to support the claim made by the Respondents to be paid for it as extra work.

LORD BLACKBURN:—

My Lords, this is a contract, made as contracts frequently are, that a great quantity of work shall be done for a lump sum, the contract sum in this case being £25,000, for which sum the contractors agreed to do a large quantity of work. It is very common in these contracts, and in this it exists, that conditions are put in more or less stringent that the engineer may require the contractors to do extra work at the same rates according to weights and measurements as they agreed to do the other work, and that he shall have power to order them to do so; and in order to provide against the risk of the parties being fixed with the cost of extra work which was not really ordered by them, it is common enough to have provisions, as these are here, more or less stringent, saying that no extra work shall be paid for unless it is ordered in writing by the engineer; and if such conditions are properly

made, and there is nothing fraudulent or iniquitous in the way they are carried out, those conditions would be quite sufficient and effectual. Now, for the purpose of doing that, where there is a lump sum put down, as there is here, for the whole, it is, as was observed by Lord *Gifford* below, absolutely necessary that there should be a scale of rates according to weights and measurements, to shew how that extra work is to be paid for. But there is a further purpose for which it is requisite. It is very common, and in this case it exists, that although the contractors are not to be paid in advance, yet they are not to be kept out of their money until the whole work is done, and therefore it is generally provided, and here it is provided, that as the work goes on they shall be paid proportionate sums according to the contract—more or less according to the work actually done. And for that purpose a survey must be made, and it is necessary that you should have a scale of rates according to weights and measurements that they may know upon what scale they are to be paid. Upon that I observe, although Lord *Gifford* does not observe it in his judgment, that this is another reason why it was necessary to mention the prices according to a scale of weights and measurements. It would be requisite to have them stated in that way in order that they might make out the sum for which the certificate was to be given, and shew that so much work was actually done, and consequently that so much money might be paid in advance.

I do not think, my Lords, that it is at all requisite in this case to enter into the question of what the real legal effect of contracts for the purpose mentioned in this particular contract is. It seems to me that all that it is necessary to see in this case is this—that for £25,000 the contractors were to do the whole of certain works named in the specification, and that amongst those specified works there were certain girders and gutters named and specified of the particular description of eighteen feet long, I think, and a certain thickness and depth. Those are put down there as being among the things in the specification which the contractors bind themselves, and necessarily bind themselves, to make for the stipulated price. The Lord Justice Clerk in his judgment treats this as if there was some fault on the part of the *Tharsis Company*, when

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amongst the things proposed as having to be done, they put down in the specification, "make these girders of this particular length and size." He says:

> It was found on experiment, at least it is so alleged by the contractors, to be impossible to execute this part of the specification in terms; that the two parts of the girder being of different thickness did not cool uniformly, and consequently were liable to be deflected or broken. In short, the specification was at fault, and the thing specified could not be done.

My Lords, I cannot agree that that was really what happened. When the *Tharsis Company*, through their engineer, said in the specification, "We want this done," there can be no doubt that they thought and believed that a girder of this length and size and thickness could be made, and they proposed that it should be made, and they put it down. There was no fraud or deceit in that; they put it distinctly to the contractors to look into it for themselves; they called their attention to it in words, I think, in one part of the contract, "See if you can do this, and tell us what price you can do it for; satisfy yourselves" (that is what it really amounts to) "whether you can do it before you enter into the contract." There is no fraud at all in that.

It was attempted to be said that it was impossible to do it. A passage in *Erskine* was cited where there is an authority, I think, taken from the Civil Law, for saying that when a contract is naturally impossible, it is void and unenforceable (1). I do not think that this contract was naturally impossible at all, but, on the contrary, it would require very strong evidence to make me believe that it was impossible to make such a girder as is here described, eighteen feet long, which the *Tharsis Company* and their engineer had deliberately put down in their proposal as to be made, and therefore evidently thought could be made, which Messrs. *M'Elroy*, ironfounders of eminence and position, having a great deal of experience, agreed and promised to make, evidently thinking it could be made. I say it would require very strong evidence to induce me to think that that was impossible, and that ironfounders could not make a thing eighteen feet long without making it thicker.

(1) Erskine 3, 3, s. 84.

The objection, as I understand it, was that when the contractors came to make it they found, in the first place, that owing to the slightness of the iron, it was liable to warp. It is admitted upon the evidence of their own people that that could be set right in a way known to ironfounders. And it is stated also that as it cooled it cracked, owing to one part of it being thick and another thin. Now there is scarcely any evidence worth adverting to, to the effect that this could not be obviated, although no doubt it was an inconvenience that would cost money.

Now my Lords, taking it in that way, I need not inquire whether the contract was, You shall make a girder such as will do, be it thick or thin, or whether it was, You shall supply a girder of the specific dimensions, we taking the risk of whether it will do. When the Respondents found that they must put in more metal than was required by the specification, that was their look-out; it was not the fault of the *Tharsis Company* at all. Now, I find that when both parties seem to have thought (I do not inquire whether they were right or wrong) in their interview that the *Tharsis Company* would object to taking these girders any thicker or heavier than was specified, when it was expected that they would say, "We will object to that, we are entitled to have them made exactly as specified in the specification" (such was Mr. *Stewart's* opinion, and the other side seems to have thought so too), then the contractors urge upon him, "We cannot do that." They said what I think amounts to saying, "That will cost us a great deal of money, we find a difficulty in making a good job of it," and they asked, "Will you then permit us" (for that is what it amounts to) "to make them thicker. We can do it if you will let us make them thicker," and there is some evidence to the effect that he said, "You may make them thicker." Mr. *Stewart* says he did not say, "Make them thicker." But I have come to the conclusion that Mr. *Stewart* makes a mistake there, and that he really was asked, "Will you allow us to make them a little thicker, which will be cheaper and better for us?"

But then there is not a word in the evidence which says that he or the *Tharsis Company* were to pay for this additional thickness. Now, I perfectly agree that when a man orders a thing for his

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own benefit you need not have the words, "I will pay for it," because it would mean that. If a man goes to an ironworks and says, "Furnish me with a ton of iron," he need not say "I will pay for it," because that is implied. If a man goes into a shop and orders goods it is implied that he will pay for them. But when, as in this case, the company say, We cannot do the work as we have promised to do it unless you permit us to make it thicker than we undertook to make it, and the engineer on behalf of the company says, I will not object to your making it thicker if you cannot do it otherwise, I think there is nothing in that to imply that there was to be any payment for that additional thickness. You are never bound to pay for goods unless you have expressly or impliedly contracted to pay for them. Here there is no express contract to pay for the additional thickness, and the circumstances, as I view them, negative an implied contract.

That being so, my Lords, I think if there was not a single word in the contract binding them to take care that any order for extra work should be in writing, and providing so carefully that if they are not in writing the extra work shall not be paid for—I say if there was not a single word of that kind in the contract, and although the company were to be liable just as an individual might be for goods ordered by him, even if that were the case I think, upon the grounds I stated just now, the claim for this £900 totally fails. It was an extra quantity of goods allowed for the convenience of Messrs. *McElroy* to be delivered on the *Tharsis Company's* works, but it was not expressly promised to be paid for, and it was not impliedly promised to be paid for. It was argued that the effect of the certificates sent in, in the way in which they were sent in, was either that the certificate related back and shewed that the *Tharsis Company* had actually promised to pay for them beforehand, or it was said the certificate amounted to a ratification of a promise made verbally before. I agree entirely with my noble and learned friend who spoke last, he has explained exactly my view of what those certificates are. They were made out with a view to regulating the advances, and shewing how much should be paid on account, not at all as shewing how much was to be paid ultimately upon the final account and reckoning.

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My Lords, upon the rest of the case I think it unnecessary to express my opinion, and I entirely agree in the resolution which has been moved by the noble and learned Lord on the woolsack.

LORD GORDON concurred.

Interlocutor of the 17*th of November*, 1877, *so far as appealed against, reversed.*

Respondents ordered to pay to the Appellants the costs incurred by them in respect of this appeal.

Lords' Journals, June, 1878.

Agents for the Appellants: *Clarkes, Rawlins, & Clarke.*
Agents for the Respondents: *Smith, Fawdon, & Low.*

[HOUSE OF LORDS.]

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WILLIAM BAILEY AND OTHERS . . . . APPELLANTS;
J. & D. ROBERTON . . . . . RESPONDENTS.

Patent—Disconformity between Provisional and Complete Specification—Anticipation—Insufficient Description of the Manner of Use—Statute 15 *&* 16 *Vict. c.* 83.

The provisional specification of a patent stated the object of the invention to be the preserving of animal substances in a fresh state; and the patentees claimed the use of a solution composed of a certain quantity of gelatine mixed with bisulphite of lime, but in the complete specification, lodged six months afterwards, they claimed as "solution No. 1," a solution composed of bisulphite of lime alone; and gave no direction how this solution was to be used. Bisulphite of lime had been used by a prior patentee. In an action for infringement against Defendants who had used bisulphite of lime pure and simple, *held*, that the complete specification, if large enough to cover the employment of bisulphite of lime for the preservation of animal substances as practised by the Defenders, would claim an invention larger than and different from that disclosed in the provisional specification, and would be open to the objection of want of novelty, and of want of a sufficient description of the manner in which the invention was to be performed, that therefore the patent was not valid and effectual to secure to the patentees the invention, or supposed invention, used by the Defenders, though it might be valid to secure to them the invention described in the provisional specification.

APPEAL against so much of an interlocutor of the First Division of the Court of Session, pronounced on a petition for inter-

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dict at the instance of the Appellants, *William Bailey* and others, against the Respondents, *J. & D. Roberton*, as found that certain letters patent were invalid.

In 1866 *Henry Medlock* and *William Bailey* obtained the letters patent which are the subject of this litigation for "Improvements in preserving animal substances." Subsequently *Bailey* became the sole owner of the patent. Messrs. *J. & D. Roberton*, who are butchers in *Glasgow*, have been in the habit of using a solution known as bisulphite of lime for the preservation of fresh meat. At one time they purchased it from Mr. *Bailey's* agent, but of late years they have obtained it from the ordinary retail druggists in *Glasgow*. The Appellants, considering this an infringement of the letters-patent, sought by petition to the Sheriff's Court of *Lanarkshire* to have the use interdicted.

The contention of the Respondents was that the letters-patent were invalid on the grounds that the complete specification described an invention essentially different from that claimed in the provisional specification; that the complete specification did not describe the manner in which the invention was to be performed; and that there had been prior publication of the alleged invention in the patent of a Mr. *Rattray*.

The provisional specification dated the 27th of June, 1866, was as follows:

> The object of the said invention is to preserve animal substances, such as meat, poultry, game, and fish, for a long time in a fresh state, so that when eaten they cannot be distinguished from the same when recently killed, and for the preservation of hides. For this purpose we dissolve the ordinary commercial gelatine in boiling water, using about two pounds of gelatine to ten pounds of water. We then add while hot a volume equal to the volume of the solution of gelatine of a solution of bisulphite of lime (usually expressed by the formula $CaO,2S,O_2$) in water, of about the specific gravity of 1070. While the solution of gelatine and bisulphite of lime is still warm and liquid we coat the substance to be preserved with it either by dipping the substance into it or by brushing it over with two or three coats of the solution. If the substance has to be transported any distance in wooden vessels, the vessels should be saturated with some of the before-mentioned solution of bisulphite of lime in water, and when dry brushed over with the said solution of gelatine and bisulphite of lime. When the solution of gelatine and bisulphite of lime has firmly solidified on the surface of the animal substance, the latter may be packed, the vessel being closed as air-tight as possible. For the preservation of hides the interior surface only requires to be coated with the solution of gelatine and bisulphite of lime. The coating on the hides and the hides must be dried before they are packed. Before treating the animal substance

other than hides as above, the viscera must be removed and the inside washed free from blood; it is then to be coated internally and externally as above described, and before it is cooked the coating of gelatine and bisulphite of lime must be removed by soaking it for a sufficient time in water.

The final specification dated the 26th of December, 1866, ran thus:

The nature of our said invention is to preserve animal substances, such as meat, poultry, game, fish, and other animal substances for a long time, and so that the same substances when so preserved, and although the animals from which the same are derived have been killed for a considerable time, cannot be distinguished when cooked from the like substances derived from similar animals which have been recently killed, and also for the preservation of hides.

The manner in which our said invention is performed is as follows:—We employ a solution hereinafter distinguished as solution No. 1, being a solution of bisulphite of lime (usually expressed by the formula $CaO,2S,O_2$), in water of about the specific gravity of 1050, which specific gravity we find preferable to that of 1070. We sometimes form a solution, hereinafter distinguished as solution No. 2, by dissolving the ordinary commercial gelatine in boiling water, using from one part to two parts of gelatine in ten parts of water, and adding ten parts of solution No. 1. In determining the proportion of gelatine to be used, we increase such proportion in inverse ratio to the decrease of the temperature of the place at which the solution is to be applied, using a larger proportion of gelatine when the temperature is low, and a smaller proportion of gelatine when the temperature is high. Solution No. 2 is adapted for coating animal substances intended to be preserved, such as joints of meat, animals which have been skinned, poultry and birds which have been plucked, fish, and also the internal surfaces of hides. For this purpose, the viscera of the animals, birds, and fish, and also the gills of fish, should be removed, and the inside washed so as to be thoroughly cleansed from blood and offensive matter. We then apply solution No. 2 while still warm and liquid to coat such animal substances either by dipping such substances into such solution, or by brushing such substances over with two or three coats of such solution. Such solution is then allowed to dry and solidify, and, if required, we pack such animal substances in casks or other suitable vessels rendered as air-tight as may be. As to hides, we first cleanse the same by washing the inside thereof; we then apply solution No. 2 while still warm and liquid to coat the interior surface of such hides, but such interior coating, and also the hides themselves, must be rendered dry before the hides can be packed; the hides can then be packed in casks or other suitable vessels, but if the hides are to be used within a short period, say two months after the application of this solution, we do not find such packing necessary.

For the preservation of animals without removing the skin or external covering thereof, and without removing hoofs or horns, we find it advantageous to employ a solution, hereinafter distinguished as solution No. 3, formed by mixing one part of salt with ten parts of solution No. 1, and from six to ten parts of water. We vary the proportion of water according to the temperature of the place at which the solution No. 3 is to be applied, using a larger proportion of water where such temperature is low, and a smaller proportion of water where such temperature is

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high. For this purpose, at the slaughtering of the animal, as soon as the bleeding ceases, and while the animal is still warm, we (by any ordinary process of injection) force solution No. 3, heated to a temperature of from 100° to 110° Fahrenheit, into the arteries and veins leading from and to the heart of the animal. We then remove the viscera of the animal and wash the inside of such animal, so as thoroughly to cleanse the same from blood and offensive matter, and the inside of the animal may be washed with solution No. 3. The animal can then be packed in a canvas wrapper or in some other suitable packing.

For the preservation of fish we find it advantageous to employ a pickle or solution, hereinafter distinguished as solution No. 4, formed by mixing ten parts of cold water, one part of salt, and one part of solution No. 1. For this purpose we first deprive the fish of the viscera and gills, and wash the inside of the fish so as to cleanse the same from offensive matter; we then pack the fish in casks or other suitable vessels, fill up such casks or vessels with solution No. 4, and then close such casks or vessels so as to render the same as air-tight as may be. Poultry and game may be similarly treated with solution No. 4, having been first plucked or skinned and the viscera removed.

We find that solution No. 4 is also useful for preventing and arresting decomposition in fresh butchers' meat, game, poultry, and fish. For this purpose the animal substance to be treated may be dipped into the solution or wrapped in a cloth saturated with such solution.

The proportions of the substances employed to form solution No. 2, solution No. 3, and solution No. 4, are respectively reckoned by weight, and not by volume.

When animal substances are to be transported dry in wooden casks or other wooden vessels, the interior of such casks or vessels should before use be saturated with solution No. 1 and then allowed to dry, but for this we make no claim.

Before any animal substance which has been coated or treated with solution No. 3 or solution No. 4 is cooked the effect of the coating or solution should be removed by soaking the substance for a sufficient time in water.

What we consider to be novel and improvements, and therefore we claim as the invention secured to us by the said in part recited letters patent are:—

Firstly, the use of solution No. 1 for preserving animal substances.

Secondly, the preservation of joints of meat, animals from which the skin or feathers have been removed, fish, and hides by means of solution No. 2 in manner hereinbefore described.

Thirdly the preservation of animals without removing the skin by means of solution No. 3 in manner hereinbefore described.

Fourthly, the preservation of fish, game, and poultry by means of solution No. 4 in manner hereinbefore described.

Fifthly, the preventing and arresting decomposition in animal substances by means of solution No. 4 in manner hereinbefore described.

But we do not claim the employment of gelatine or salt, nor of the processes of cleansing or injection, nor of air-tight vessels, except in connexion with and in aid of solution No. 1, and for the purpose of preserving animal substances, nor do we claim the use of solution No. 1 except for the purpose of preserving animal substances.

The provisional specification of Mr. *Rattray's* patent for "Im-

provements in preserving organic substances," dated the 21st of June, 1861, and which substantially sets out his claim, was as follows:

My said invention consists, first, of a mode of preserving animal and vegetable matters by impregnating them with an aqueous solution of sulphurous acid. For this purpose I plunge the material to be preserved in a quantity of the solution, or otherwise bring the solution into contact with the surface of the material for such a length of time as may be requisite to produce the necessary impregnation. When fresh animal and vegetable matters have been impregnated with a solution of sulphurous acid in this manner, the effect is to preserve them from decay for a considerable period.

My said invention consists, secondly, of the use of the alkaline and earthy sulphites in packing preserved animal and vegetable matters in cases, and I introduce these sulphites, either dry or in solution, into a case with the preserved matters, for the purpose of assisting more effectually to prevent them from undergoing decay or injurious change.

The Respondents pleaded *inter alia*:

(1.) The Respondents having made use of bisulphite of lime alone for the preservation of meat, and that article having been well known and generally used by the public prior to June, 1866 (the date of the alleged letters patent), the Respondents have not infringed the alleged letters patent. (2.) The alleged letters patent and relative specification do not apply to the use of bisulphite of lime alone in the preservation of animal substances, and the use of that article alone is not an infringement of the alleged letters patent. (3.) Assuming that the said letters patent and relative specification apply to the use of bisulphite of lime alone for preserving animal substances, the same are null and void, in respect that bisulphite of lime was well known and generally used by the public for the preservation of animal substances prior to the date of the said letters patent. (4.) The application of bisulphite of lime alone to the preservation of animal substances is not any manner of new manufacture, and is not an invention which could be the subject of a patent. (5.) Assuming that the alleged letters patent and relative specification apply to the use of bisulphite of lime alone for the preserving of animal substances, the same, *quoad* that application, are null and void, in respect that the so-called invention was known and published within the United Kingdom prior to the date of the said letters patent. (6.) Assuming that the alleged letters patent and relative specification apply to the use of bisulphite of lime alone in the preservation of animal substances, the same, *quoad* that application, are null and void, in respect that the said *Henry Medlock* and *William Bailey*, the alleged patentees, were not the first and true inventors of the said application. (7.) The alleged invention, as described in the final specification, varies materially from the alleged invention as described in the provisional specification, and the alleged letters patent are therefore null and void. (8.) The letters patent are null and void, in respect that the final specification claims the absolute application of bisulphite of lime for the preservation of animal substances, without limiting its application to the modes of using it described in the specification.

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The parties having been allowed a proof of their respective averments, the petition for interdict was heard before the Sheriff Substitute of *Lanarkshire* (Mr. *Guthrie*) in July, 1875, and in October, 1875, the following amendment was made on the record by the Appellants:

With the view of obviating the necessity for farther probation, the Pursuers admit that between the 21st of June, 1861, and the date of Pursuer's specification of the 27th of June, 1866, solutions of bisulphite of lime were publicly used for the preservation of animal substances by *William Rattray*, chemist, *Aberdeen*, but that only in the manner described in the specification number 8/7 of Process (*Rattray's* specification).

Subsequently the Sheriff Substitute pronounced in favour of the Appellants, granting an interdict. On appeal, the Sheriff of *Lanarkshire* (Mr. *Dickson*) reversed the Sheriff Substitute's interlocutor (1), finding that the letters patent were invalid, and on the 23rd of February, 1877, the First Division, confirming the Sheriff's decision, pronounced the following interlocutor:

Find that the Appellant (Mr. *Bailey*) is assignee of the letters patent which were granted to *Henry Medlock* and the Pursuer, dated the 27th of June, 1866 . . . . Find that during the years 1873 and 1874, or during part thereof, and during the currency of the said letters patent, the Respondents did at their shops or premises in *Gallowgate Street* and *Duke Street, Glasgow*, use and employ for the preservation of animal substances bisulphite of lime, being the solution No. 1 claimed by the patentee under the first head of the claim in the complete specification: Find that between the 21st of June, 1861, and the date of the Pursuer's provisional specification of the 27th of June, 1866, bisulphite of lime was publicly used for the preservation of animal substances by *William Rattray*, chemist, *Aberdeen*, in the manner described in the specification of his patent 8/7 of progress: Find that the complete specification describes the nature of the invention claimed under the said first head, but does not describe or ascertain the manner in which the said invention is to be performed: Find that, in so far as regards the said first head of the claim, the complete specification is disconform to the provisional specification, and claims a different invention from that which is disclosed in the provisional specification: Therefore find that the patent is not valid and effectual to secure to the patentee the invention, or supposed invention, used by the Defenders as aforesaid: To this extent and effect, sustain the defences: Refuse the prayer of the petition, and decern: Find the Defenders entitled to expenses both in the Sheriff-Court and in this Court.

On appeal to the House,

The Attorney-General (Sir *J. Holker*) and Mr. *Webster*, Q.C. (with them Mr. *Lawson*), were heard for the Appellants.

(1) Scotch Cases, 4th Series, vol. iv. p. 545.

Mr. *Aston*, Q.C., and Mr. *MacClymont*, were heard for the Respondents.

The following cases were cited: *Newall* v. *Elliott* (1); *Thomas* v. *Welch* (2); *Simpson* v. *Holliday* (3); *Parkes* v. *Stevens* (4); *Crossley* v. *Beverly* (5); *Hill* v. *Evens* (6); *Young* v. *Fernie* (7); *Arnold* v. *Bradbury* (8); *Foxwell* v. *Bostock* (9); *Penn* v. *Bibby* (10). See also *Dudgeon* v. *Thomson* (11); *Rex* v. *Wheeler* (12); *Brunton* v. *Hawkes* (12); *Morgan* v. *Seaward* (13); *Wood* v. *Zimmer* (14); *Betts* v. *Menzies* (15); *King* v. *Metcalfe* (16); *Booth* v. *Kennard* (17); *Cannington* v. *Nuttall* (18).

The following opinions were delivered by the Law Peers:—

LORD CAIRNS, L.C.:—

My Lords, the arguments in this case at your Lordships' Bar have occupied some time, and the materials are of some length, but I shall have occasion to take up a very short portion of your Lordships' attention for the purpose of the observations which I have now to make. I own I am perfectly satisfied with the decision of the majority of the Court of Session, and I propose to conclude with a motion which will in substance affirm their decision, subject to one alteration in the interlocutor in point of form, which I will mention more particularly by-and-by.

Now, my Lords, the first question in this case throughout has appeared to me to be, What is the meaning of the provisional specification in the case? What is the invention which is described

(1) 4 C. B. (N.S.) 269, 293.
(2) Law Rep. 1 C. P. 192.
(3) Newton's Patent Journal, 238; 13 W. R. 577, on appeal, Law Rep. 1 H. L. 315.
(4) Law Rep. 8 Eq. 358; Law Rep. 5 Ch. 36.
(5) 9 B. & C. 63; 1 Webs. P. R. 112.
(6) 4 De G. F. & J. 288; 8 Jur. (N.S.) 529.
(7) 4 Giff. 577, 611; Law Rep. 1 H. L. 63.
(8) Law Rep. 6 Ch. 706.
(9) 1864, Higgin's Patent Cases, 164; 10 L. T. (N.S.) 144; 12 W. R. 723.
(10) Law Rep. 2 Ch. 127.
(11) 1873, 11 Macph. 863.
(12) 1819, Higgin's Patent Cases. p. 169.
(13) Ibid. p. 172.
(14) Holt, 58.
(15) 10 H. L. 117.
(16) 2 Stark. 249.
(17) 26 L. J. (Ex.) 305; 1 H. & N. 527.
(18) Law Rep. 5 H. L. 205.

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in that provisional specification? That is the foundation of the whole of the claim of the Appellants. Whatever be the invention which is there described that is the invention which the Appellants inform the Crown they have discovered, and in respect of which they ask for the protection of a patent—that is the invention in respect of which the patent is given to them; and whatever be that invention, it became their duty to specify it, and not another or a different invention, in the complete specification.

Now, looking at the provisional specification, and looking at it in the first instance without reference to any external evidence as to any peculiar meaning in the terms of it, taking it like any other document which your Lordships might have to construe, I cannot for a moment doubt, without any minute examination of the sentences of it, that the conclusion at which any person must arrive after reading it is this, that the invention which those who wrote out the provisional specification conceived they had made was not an invention merely of the chemical application of bisulphite of lime to animal substances, such as meat and fish, but was a mode of applying a coating or film to the outside of animal substances, which coating or film was to consist of gelatine, or some substance of the same kind, mixed with a solution of bisulphite of lime. In that way you were to obtain a wash and you were to use it as a coating; and upon that point I may say that I observe the term "coat" or "coating" used not less than six times in this very short specification. It is to be put on by dipping or brushing; and if the first coating is not sufficient it is to be repeated two or three times; it is then to be left to harden or to solidify, and the animal substance is to be thus preserved; and when the time comes for it to be used the coating is again to be softened with water by steeping and thus to be removed.

My Lords, of course it would have been possible, if it had been in the mind of the inventor, to have said, What I have invented is this: I have discovered the great advantage of bisulphite of lime as applied to the surface of animal substances, but I find it cannot be conveniently applied without some medium in which it is to be placed for the purpose of making it adhere to the surface of the animal substances, therefore I claim to use it in a medium consisting of gelatine, and to put it on in that way. He

might have done that, but that I repeat is not what has been done. What we have is a statement of an invention such as I have described in the first instance and not any other invention. My Lords, I may add that if that be the invention, so far as any evidence which has been adduced in the case is concerned, it appears to be not only to be a subject for a patent, but, as regards novelty, to have been at this time a perfectly new invention; for I have heard no evidence to shew that this application to animal substances had been practised before.

Now, that being the conclusion at which I should arrive, looking at the provisional specification as it stands, it is satisfactory to my mind to find that a scientific witness who is brought forward as the leading witness for the Appellants, appears to be exactly of the same opinion, because I find that Dr. *Wallace* who had said in his evidence in chief, speaking of the complete specification, which I will afterwards come to, that the essence of the patent as evidenced by the complete specification was the application of the bisulphite of lime pure and simple for the preservation of animal substances. On being asked with regard to that, "Do you find any indication of that in the provisional specification?" he answers "No, he takes in gelatine along with it in the provisional specification." Subsequently this question is repeated to him, "Is a solution of bisulphite of lime pure and simple" (for that is the point), "disclosed in any way by the provisional specification?" to this he answers "No, he does not mention the use of it by itself." Dr. *Wallace* does not venture to say, nor does any other scientific witness that I can find venture to say, that such was the state of science, and that such was the knowledge and invention of the time that any person taking up this provisional specification would have known at once that he was entirely to disregard the mention of gelatine, to treat it as though it was not there, and at once to march to the conclusion that the invention was the application of bisulphite of lime pure and simple. No person makes any statement of the kind. Therefore, your Lordships have the satisfaction of finding that the evidence outside the provisional specification leads, as it seems to me, exactly to the conclusion at which you would naturally arrive from the perusal of the provisional specification itself.

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My Lords, starting from that, I must repeat the question which I took the liberty of putting to the learned counsel for the Appellants at the Bar. Supposing the provisional specification had been in the terms of the complete specification, would it have been possible upon it to have maintained an action against the present Respondents for infringement? Mr. *Webster* felt, I think, the necessity of answering this question; he proposed to answer it by saying that an action could be maintained, but it seems to me that the moment he undertook to establish that, he was obliged to pass away from the provisional specification, and to treat it as though he could read into it the claim made in the complete specification. I therefore prefer to rest upon the evidence of the witness I have referred to, a witness who was obliged to answer that it was impossible to say that that which was done by the Respondents is struck at by the wording of the provisional specification.

Now I pass to the words of the complete specification. Is the complete specification in accord with the provisional specification? If it goes no further than the provisional specification goes, then, in my opinion, the complete specification may well describe a fit and proper subject for a patent, and it may be maintained as a specification for an invention which, so far as regards the evidence in this case, is a new invention. But if it goes beyond that, if it claims that which was put by way of interrogation to Dr. *Wallace*, the use of bisulphite of lime pure and simple, then, if your Lordships agree with what I have already said, you will, I think, be of opinion that it makes a claim different from, and larger than, the claim in the provisional specification. Now what says the complete specification? I need not go through it, but your Lordships see that the first sentence, which is the material one to refer to, proceeds thus:

> The manner in which our said invention is performed is as follows. We employ a solution hereinafter distinguished as solution No. 1, being a solution of bisulphite of lime (usually expressed by the formula $CaO,2S,O_2$ in water of about the specific gravity of 1050, which specific gravity we find preferable to that of 1070.

And so far as regards the solution No. 1, the complete specification ends as to any separate use to be made of the solution No. 1, with one exception which I will mention afterwards. The com-

plete specification then goes on to speak of what are termed solution No. 2, solution No. 3, and solution No. 4. Each of those other solutions, Nos. 2, 3, and 4, is formed by taking the solution No. 1 as a basis and admixing it with certain other component parts, and if it is the case that solution No. 1 is set up merely as a basis to be afterwards admixed with No. 2, No. 3, and No. 4, then, inasmuch as your Lordships find an accurate and complete description of the manner in which the solutions of No. 2, No. 3, and No. 4 are to be used and applied, certainly the complete specification is open to no charge of being defective as not shewing how the invention is meant to be performed. But, on the other hand, if the solution No. 1 is not only set up as a basis to be afterwards admixed with No. 2, No. 3, and No. 4, but to be used by itself pure and simple, then, my Lords, I am bound to say that I must concede the cogency of the observations of the learned Judges in the Court below, that there is absolutely no statement of any kind how the solution No. 1 is to be applied or used. I said there was one exception, and that exception makes more general the statement which I have made. The one exception is the statement that

> When animal substances are to be transported dry in wooden casks, or other vessels, the interior of such casks or vessels should, before use, be saturated with solution No. 1—

That is, solution No. 1 pure and simple—

> and then allowed to dry; but for this we make no claim.

Therefore, in the only instance in which, throughout the whole of the complete specification, they speak of any use or application of solution No. 1 pure and simple, in that only instance they say that they make no claim with regard to the solution No. 1 at all. My Lords, it appears to me, therefore, that if you are to read this complete specification as making a claim for the independent and separate use of solution No. 1, you at once are obliged to arrive at the conclusion that there is no mode pointed out in the specification of how that solution No. 1 is to be applied. My Lords, the question was asked: How comes it in practice that solution No. 1 has been used, and how came private butchers to know how to use it, because undoubtedly this solution No 1 pure and simple has been used? I do not think it necessary to refer to the contents of a

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document which is mentioned in some of the judgments of the learned Judges in the Court of Session (1), and which appears not to be in the process; but this does appear, that in some way or other when the solution No. 1 came to be used by the patentees pure and simple they accompanied it with the circulation of cards in which, somehow or other (perhaps it is better for us not to inquire how), they explained the manner in which solution No. 1 was to be applied. The importance of this I am bound now to state. If the complete specification does not set up No. 1 as a solution to be used separately pure and simple, then the complete specification will be in accordance with the provisional specification, and the patent may be, for aught I know, a perfectly valid patent. But if, on the other hand, the complete specification claims the solution No. 1 and the use of it separately as an invention pure and simple, then indeed the Appellants may be able to shew that the Respondents have infringed that use. But, on the other hand, they can only do so by claiming an invention through the medium of the complete specification which is not mentioned in the provisional specification, and as to the mode of exercising or applying which they cannot in that specification point out any claim or any information given to the public.

My Lords, that seems to be simply the case as regards the difference between the provisional and complete specifications. Now, if the complete specification conveys, as I suggested it might be construed, merely the statement that solution No. 1 is a basis to be afterwards used in the manner I pointed out with regard to solutions Nos. 2, 3, and 4; with reference to the evidence in that case, I see no evidence that such use had been anticipated or ever before had taken place. But if the claim of the complete specification is to the use of solution No. 1, that is, of bisulphate of lime pure and simple, then it seems to me that the Appellants at once fall into the danger of having been anticipated by the use which was admitted to have taken place in the case of *Rattray;* because in the case of *Rattray's* patent it is admitted by continual admission between the parties that the "solutions of bisulphate of lime were publicly used for the preservation of animal substances by *William Rattray*, chemist, *Aberdeen*, but that only in the manner

(1) Scotch Cases, 4th Series, vol. iv. at p. 575.

described in the specification." There is, therefore, this admission that they were used: the manner in which they were used, if they were used for the preservation of animal substances, seems to me quite immaterial, because what the Appellants are obliged to contend for is, that there is a claim by them in the complete specification for the use of the solution No. 1, being a solution of bisulphite of lime without any description of the way in which it is to be applied. It is an absolute claim to the use in any way of the bisulphite of lime. But if in any way (it matters not how) *Rattray* did apply it before, then they have claimed an application of that which in some way or other was applied by *Rattray* before.

On this point I am obliged to admit entirely the justice of the question put by Lord *Shand* in the Court below. Says Lord *Shand*, Suppose that *Rattray* after this patent were to do what he is admitted to have done before, what answer could he give to these patentees, if they are right, who say that there is secured to them by their complete specification the absolute user of the solution of bisulphite of lime pure and simple? My Lords, he could have no answer. It would be nothing for him to say, Oh! yes, I use it, but I use it only in such a way. They would reply, Look at our complete specification. We have said nothing as to the way in which it is to be used. We have claimed it for the preservation of animal substances. You are using it for the preservation of animal substances, and therefore you are infringing our patent. But if he did this before the patent was issued, then the patent, according to that construction, is open to the charge of want of novelty. That is the whole of the case, but I am extremely anxious not to assent to any form of interlocutor which absolutely pronounces this patent to be invalid. I do not desire to say that it is invalid—it is only invalid if a construction is attempted to be put upon it which would be sufficient to restrain the present Respondents from doing what they have been doing. If a limited construction be put upon it, a construction which would make it in accordance with what I hold to be the meaning of the provisional specification, I see no reason, and I do not think it necessary to decide that question, why it may not be a valid patent.

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My Lords, when I said that there was an alteration of the interlocutor of the Court of Session which I would suggest, what I referred to was that the interlocutor as it now stands appears to be open to this interpretation, that it pronounces definitely once for all that the patent is invalid. That appears to me to be unnecessary, and what I would suggest to your Lordships as an alteration of the wording would be this. I should propose to your Lordships to omit from the words "find that the complete specification" down to the word "therefore," and in place of the wording of the interlocutor as it is there printed, to insert the words "Find that the complete specification, if large enough to cover the employment of bisulphite of lime for the preservation of animal substances as practised by the Defenders, would claim an invention larger than and different from that disclosed in the provisional specification, and would be open to the objection of want of novelty, and of want of a sufficient description of the manner in which the invention is to be performed." The interlocutor will then proceed: "Therefore find that the patent is not valid and effectual to secure to the patentee the invention, or supposed invention, used by the Defenders as aforesaid. To this extent and effect sustain the defences." My Lords, I think of course that that alteration ought not to make any difference as to the costs of the appeal, but that they should be paid by the Appellants.

LORD HATHERLEY:—

My Lords, I entirely concur in the view which has been taken by my noble and learned friend on the woolsack in this case. If I think it necessary to add only a very few words to what has been said, it would be rather to explain for my own satisfaction the grounds upon which I concur with him than to add any new light to the observations on the point of law which have been made. I think there can be no doubt in reading the provisional specification in this case that intending, as the applicants for the patent then did, to preserve as they say, not meat which already was in a preserved state—not meat which was in the nature of dried meat, or the like, but fresh meat soon after it was killed, and to preserve it, as they express it, in such a manner as that the flesh would retain the appearance that it might present immediately upon or

soon after death—they proceeded evidently to set forth a process by which that end was to be obtained. Now, without the slightest difference of expression with regard to the two subject-matters which they intended to use for preserving the meat, without the slightest difference of expression as to the efficacy of the one or the other, they propose that in certain quantities there should be mixed together this substance which is called bisulphite of lime, which appears to consist of sulphate of lime, the solid substance, and sulphurous acid in which that solid substance becomes soluble, and which may then be called bisulphite of lime, or which at all events is now at this time sufficiently known, whatever may have been the case before the date of the patent in question, by that name. That is the one substance; the other substance to be put to that to make up the mixture for the purpose of preserving the meat was gelatine. Now it is said that this gelatine was only put in, and must have been known to everybody to have been put into the mixture intended to have the effect desired, solely for the purpose of fixing the solid parts of the compound, of the lime, for instance, which had been put into the common mixture, and to bring the whole to solidify, so as to present a compact surface, which would keep the meat in the fresh state that was desired; when required for use, the meat, before being cooked, was to be washed, to remove all that adhered to the surface.

Now, it is said that the bisulphite, as far as it had any known power, was a distinct antiseptic, as it was called in the course of the argument. We do not find the word "antiseptic" used anywhere in the patent, but we may presume that the bisulphite of lime was the stronger of the two ingredients of which the patent was composed. At the same time I cannot admit, as was suggested in the opening by the learned Attorney-General, that anybody knowing at all the properties of gelatine, and how to deal with it, would have known that gelatine could have no antiseptic properties, and could only be used for the purpose he described. So far from that being the case, I venture to think that anything that excludes the oxygen of the air, excludes the approach of the enemy, if I may describe putrefaction as being the enemy. The antiseptic, as it has been termed, or the bisulphite of lime, fights the enemy hand to hand, and seems, as some of the witnesses say, to have the power

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through the medium of the sulphuric acid, which has been used before for purifying purposes, of overcoming or repelling that which is being attacked, or, at all events, of warding off the attack which has been made, for a short time.

Now, anybody who has read the provisional specification, would say that from beginning to end there is no separation of those two ingredients—they are placed in the very fore-front of the specification and are described as to their composition and as to the heat to be applied, as to the specific gravity compared with water of the mixture—all that is perfectly well taken care of and is described, as has been said already; and if the complete specification is really no more than carrying this invention into effect, it may, for all I know, be a fair foundation for a patent. But then if you take that to be the patent, as has already been observed, Mr. *Roberton* has not infringed it—he has not used the mixture of gelatine and bisulphite of lime—he has used bisulphite of lime simply, and that is the only accusation against him upon the present inquiry. Therefore he would be free from all impeachment of infringement of the letters patent.

But then, in order to draw Mr. *Roberton* within the meshes of the patent, it is said that in effect he has violated the patent itself, because the complete specification does something more, and that has been the great difficulty which the Appellants have laboured under all through; they are obliged to say that there is something more, else they cannot catch Mr. *Roberton*, and if they do say there is something more, they involve themselves in a considerable difficulty. Now what happens is this. In the complete specification certain mixtures are spoken of, the first being the composition No. 1, that not being a mixture of any two things, but being bisulphite of lime in a liquid state. Then follow Nos. 2, 3, and 4, all of which are compounds of bisulphite of lime with some substance or other, some with gelatine; one for the purpose of injection into the veins of the animals (which does not appear in the provisional specification at all, but is one of the objects mentioned in the complete specification) that was to be mixed with salt, but in no single operation is there any direction as to the use of bisulphite of lime alone without any other material except in the case mentioned by the Lord Chancellor, namely, the case of saturating

the casks in which animal substances are to be packed dry, which for good reasons, the patentees say they do not claim; they do not claim the lining of casks with it, and I say with good reason, for that had reference to *Medlock's* patent, which is a patent relating to the preservation of beer, in regard to which he says that part of his procedure is with this bisulphite of lime to deal with the casks in which the beer is contained—that was very much the same process as dealing with the casks which contain the meat—and therefore that could not be claimed without exhibiting at once the defect of want of novelty.

Now, if we read the patent as meaning nothing more than the use of bisulphite of lime in these various states of mixture, I am not prepared to say that that may be erroneous on the part of the patentee, but if we are asked to do anything more, then we find that he falls into the difficulty that he has distinctly claimed a more extended right in his complete specification than he did in his provisional specification—more extended in this sense, because whereas the provisional specification would say this, "You must for these purposes have gelatine and bisulphite of lime," if he is to continue the complete specification as entitling him to shut out others from the use of the bisulphite alone he must say, "I claim also a patent for doing this without the assistance of gelatine"—that is to say by a simpler and cheaper process, and by a combination of other things besides gelatine, which undoubtedly would be an extension of the patent, unless, at all events, it were some part or other of the specification to which he wished to assert his rights under the patent.

My Lords, it appears to me to be most unfortunate in this case—and I do not think it is the common practice in the case of an invention—that the patentee should not have been called. I do not know that there is any explanation why he was not, but if he had been called, he might have been asked a few questions which would have materially assisted us in coming to a conclusion upon the facts. But your Lordships must see that one of the points in which the provisional specification differs from the complete specification is, that you cannot feel any certainty that at the time the letters patent were granted upon his complete specification he really had invented the things which he afterwards says

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he had invented. When you find that there is a discrepancy between the two specifications, there is a grave reason for suspecting that any alleged invention, so far as it exceeds or transcends the original specification, has been supplemented by further discovery. If that is so, how are we to take it? If we are to take it in the enlarged sense, it is undoubtedly struck at in the matter of novelty by *Rattray's* patent, for we have an admission on the record that *Rattray* did use this very material—this bisulphite of lime—coupled with this restriction, that he only used it pursuant to his patent. Therefore we are brought to consider his patent and his use of this very material which it is said nobody else must use. Now the course that *Rattray* takes is plain, it is for the preservation of organic substances—it goes rather further than the mere question of meat, which is the subject dealt with under the Pursuer's patent here—and he says he has two inventions in respect of dealing with organic substances; one process is that in which he says he preserves meat for some time by sulphurous acid—that is to say that the sulphurous acid would not be a long or a permanent preservative, but would preserve the meat for some time from the process of putrefaction setting in. Then he says, my second process is this: The packing of organic substances so as to continue longer in a state of preservation, and in order to continue them in a state of preservation, he says, I take preserved substances (I agree with the learned Attorney-General's observation), not fresh meat, and then he proceeds in the second paragraph to describe the mode of applying the wet process. Now, this preserved meat here referred to is not meat preserved with sulphurous acid simply, to which the first part of his patent relates, but meat preserved in any mode in which meats are preserved, whether by salting, drying, or smoking, or the like. Then he enters into the main points of his invention, and he says, As to the second part of my process, which relates more particularly to organic substances treated by my first process, I deal with them in this way, and then he proceeds to say how he deals with those things preserved by the first process, but at the same time maintaining a generality of expression, implying that he means to apply these two processes—the dry process and the wet process—to all meats which are preserved. Then he proceeds to use the

bisulphite of potash. There is some dispute as to whether the dry process is included in it, because there was some suggestion about the earth which is used being reduced to a powder, which it is said cannot be done. I will not pursue that question as to the bisulphite of potash, but at all events as to the wet process, he used bisulphite of potash. It is submitted upon the record that that was used during the interval between *Rattray's* patent and the Pursuer's patent, and it would deprive the Pursuer's patent of novelty unless it might be said that it might be left as an open question to be decided hereafter whether there is a possible opening for a patent as for a new invention where a leg of pork has been plunged into this liquid formed by the bisulphite of lime or potash, and not a ham or other preserved meat. The conclusion is, that it is a discovery applicable to every sort of organic matter, whether vegetable or animal; and it must be recollected that in the second process, where he introduces this bisulphite of potash, he applies the process entirely to the purpose of preserving meat. But I say, the only way in which the Appellant can stand for a moment, is by being content to bring, if he can, the second part of his patent into perfect accord with his complete specification—if he can do that, he might possibly have some chance in that respect. But still, as the matter stands, I should still hold that *Roberton* has not infringed any valid patent of the Pursuer. I quite agree, therefore, with the proposal of the Lord Chancellor as to what shall be done in the case.

LORD BLACKBURN:—

My Lords, I entirely agree with what has been said by the noble and learned Lords who have preceded me. I do not think it necessary to go into much detail in what I am about to say. I would first say what occurs to me upon the question, upon which the interlocutor of the Court below entirely proceeds, of what is called the nonconformity of the complete specification with the provisional specification. I take it that when you consider the history of patents in *England*, there is not very much difficulty in construing the statute of 1852, upon which it all turns, as far as regards this particular case. This is a Scotch case, but I think that the Scotch patent law has entirely adopted and incorporated

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the English. The patent law dating from the time of *James*, gave a monopoly to the invention of the first inventor, it therefore gave a monopoly solely to that invention which was his invention; he could not claim an invention greater than the title of the patent, but the titles were of extreme generality. It is in this particular instance "for improvements in preserving animal substances." Almost any kind of thing would come under that description; the mere title gave very little instruction. Then in the time of Queen *Anne*, the Attorney-General of the day invented what was obviously a very great improvement. He made it a condition that the patentee should, within six months, particularly "describe and ascertain" the invention and the manner in which it was to be performed; if not, it should be void. If that was done at the end of six months, that specification fixed what was the invention for which the patent was granted. Then during the six months it would have been, and before specifications were invented it must have been, a question of evidence as to what was the invention for which he went to the Crown, and for which the Crown granted a monopoly, and the traverse of that would be the proof. Then came the statute of 1852, which introduced a further amendment. It enacted that when persons went to apply for letters patent they should deposit a provisional specification. That provisional specification describes the invention in terms very different indeed from those in which the final specification described it. In this case, instead of saying "It shall particularly describe and ascertain the nature of the invention and in what manner the same shall be performed," all that the statute says is that in the provisional specification which the applicant leaves with the law officer of the Crown when he applies for a patent, he shall state the nature of the invention—no more than that; and then, when the law officer of the Crown, to whom it is referred, has looked at it and finds it does state the nature of the invention, but thinks the nature of the invention as stated is too large or too vague, he may require him to amend it; but if not, then he grants a certificate to use the patent publicly without at all thereby making a present of the discovery to the public; and when it came to be a question whether or no what he was doing during that six months did avoid the patent, I take it the process must have been to say,

"Look at the nature of the invention described in the provisional specification, and say whether this which you have been doing, and which you say was a part of the patent, is fairly within the nature of the invention you have described, in that case you are protected; but if it is a new and separate invention, and a different one, then you are not protected." I cannot but think that when that is once looked at, it becomes pretty clear that when the nature of an invention has been described in the provisional specification in the way which has been mentioned, if something were found out during the six months to make the invention work better, or with respect to the mode in which the operation may be performed—a thing which is very likely to happen when, in carrying out his invention, the inventor finds that some particular bit will not work so smoothly as he expected, and it is necessary to add a little supplement to it—still the nature of his invention remains the same, and it is no objection that in the complete specification, which comes afterwards, the invention or application is described more particularly and in more detail, or even if it be shewn that there has been more discovery made, and so as to make the invention which he has described in the provisional specification really workable. If nothing more is done than that, I think it is good; but as soon as it comes to be more than that, and the patentee says, in the provisional specification, I describe my invention as A, and in the complete specification he says I hereby describe A, and also B, then, as far as regards B, it is void, because the letters patent were granted for the invention that was described in the provisional specification, and do not cover the invention that is described in the other.

Now, my Lords, applying that principle to the present case, it becomes necessary to see what was the provisional specification, and what was the complete specification. What do they mean? I need say very little on this head, because I agree completely with what has been said, both in the Court below and with what has been since said by your Lordships; but I may mention this, that the state of chemical and general knowledge at the time when this patent was granted, in 1866, appears, I think, to be very clear. I do not find that there is any discrepancy in the evidence at all in respect to this point. It had been known for a long time

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that sulphurous acid had the power of stopping fermentation, and that, including other fermentations, it had the power of stopping the fermentation which ends in putrefaction. It had also been known—I will not say for how long—that the earths and salts which were combined with sulphurous acid had the same effect. It was explained by Dr. *Wallace*, that whilst the sulphurous acid is being applied to the earthy substance or the salt (the oxygen of the atmosphere combining with it turning the salt, which was the bisulphate of lime, into plaster of *Paris* or gypsum), the sulphurous acid is slowly let off. I have nothing to do with whether that is the right theory or not; the result is a fact that was known. If we want to make certain that that fact was known, nothing can be better for the purpose than what we find in *Medlock's* own specification in 1861. There, talking of how he purifies fermented liquor by sulphurous acid, he says in very clear language, I wish to introduce sulphurous acid into the beer for the purpose of preventing it from fermenting further and becoming sour. He also says (I am giving his statement colloquially), I find that it will do as well if I put in a salt of sulphurous acid. I find a great many salts of sulphurous acid—of all the salts, and I have tried a great many, I find that the effect of the bisulphate of lime (whether that is the technically correct word or not is not important) does best; and putting that into the vessel in which the beer is, it prevents the acetous fermentation, which does the mischief. As the oxygen of the atmosphere combines with the bisulphite of lime, it turns it into pure and simple sulphate of lime, an earthy salt, which does no harm at all, but collects in the barrels, and does rather good than harm by making them air-tight.

Now, taking the provisional specification, I cannot bring my mind to doubt that the gentleman who drew it thought that the salt of sulphurous acid which is made by lime, the bisulphite, was useful for preventing decay in anything, and consequently in preventing decay in fresh meat, but he probably thought that to make it useful for preserving fresh meat we must bring it into contact with the fresh meat. I cannot but think that his intention when he drew the specification was this: Fix it with gelatine and paint it on when it is warm. The gelatine will freeze and then

the sulphite of lime which is embodied in the gelatine will remain and form a coating, and even when you are travelling it will not shake off, and no doubt that is true enough. If you simply sprinkle or paint the bisulphite of lime upon the meat and allow it to dry, the salt as it was deposited lying loose upon the surface of the meat, probably if you carried it any distance in a butcher's cart or by railway, the shaking during the locomotion would shake the salt off, whereas if it were covered with gelatine it would not shake off. I think it very probable that what was described in the provisional specification might turn out a useful invention in that regard. Whether it is or not will be considered hereafter when the question arises; but what Mr. *Roberton*, the Defender here, has done is no infringement of that—it is an infringement rather of what is added; of the other claim which the patentee in his complete specification makes when he says, I take the bisulphite of lime and use that simply. If that claim is made as a complete claim and a new one, then I quite agree with Lord *Shand* in the view he puts that if that were a new thing it would be the subject of a patent itself and ought to have been the subject of a separate patent, and cannot be tacked on to the other invention which was stated in the provisional specification. If that be not claimed here, which is the only alternative, then there has been no infringement, because what Mr. *Roberton* has done has been no infringement of the provisional specification, though it may be of the other. My own impression is, at all events, that if it is an infringement still they would not be able to recover, even if it were a new matter. I should be sorry if that were so, because I think it would come to this, that if it were really a beneficial discovery the inventor would have made the public a present of it when he never meant to do so, therefore I am glad to think that if you had taken out ever so many patents for this additional claim they would not have been valid, because the material would have been used before, and it is perfectly clear to my mind that when we look at the evidence it is shewn to be so.

I have already said what I consider to be the nature of the chemical knowledge possessed in 1861. Mr. *Medlock's* patent, which I quoted, is a month or two afterwards, or about the same time as *Rattray's*, and therefore taken out under about the same

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amount of chemical knowledge. Now what *Rattray* says in his description of his process is this: First of all he tries to cure the meat by sulphurous acid in a way which I daresay would make it very unsightly and perhaps very unpleasant to the taste, and I daresay the patent did not prove a success on that account. Then he proceeds to say, "After that has been done I would pack it in one of two ways." Having reference to the treatment described in the first part of the invention, though he does not confine himself to that, he says in his specification:

> I dip them into a solution of either of the alkaline or of the earthy sulphites . . . . I then allow the substances to drain, and expose them to the air for about two hours in a warm place, so that the water contained in the solution of the salt remaining on the surface may evaporate and leave the dry salt on the surface of the preserved substances.

Now he there says he will take any sulphite, and that, as it is pointed out in the evidence, is a matter which would prevent the operation of his patent from becoming beneficial. It is well known that some of the earthy sulphites in a dry form are rank poison, and that would be a very serious objection indeed to their use for the preservation of meat—others while not poisonous are objectionable. We know that the alkaline sulphite of soda, for instance, turns into *Glauber's* salts, the sulphite of magnesia turns into *Epsom* salts, and we know what the effect of that upon the human body would be, and sulphite of lime turns into plaster of *Paris*. These are all objections which may be very strong ones against *Rattray's* specification. Then comes the admission for the purpose of avoiding proof—the Appellants admit that *Rattray* did use sulphite of lime, and having done that do they not state here as clear as can be: "I take the solution of sulphite of lime and one of the earthy substances." That sulphite of lime, we must remember, is soluble in sulphurous acid and becomes what is called bisulphite. I take that solution of bisulphite of lime and dip the meat into it. I let the meat dry until a dry salt forms upon the surface of the meat and that stops the progress of decay. Now in this case what is it that Mr. *Roberton* has done?—he has not taken fresh meat and dipped it into the solution, but he has taken fresh meat and spread the matter upon it with a brush. I cannot say that I see much difference whether he had taken fresh meat, or Mr. *Rattray* had

taken it and dipped it into the solution, it would be just as much an infringement as before.

Now, because *Rattray* says that he does it for the purpose of stopping decay in partially preserved meat, can it be said, taking the instance which my noble and learned friend just now gave, that Mr. *Rattray* could be stopped, and that it could be said: You have dipped a ham into bisulphite of lime, and so stopped the putrefaction; but I say you shall not dip a leg of fresh pork into it. I think you cannot do better than take the old illustration. The old illustration was, you cannot take out a patent saying: You have eaten soup with a spoon, I will take out a patent for eating pea soup with a spoon. You have taken out a patent for sweeping an old carpet with a new broom, I will take out a patent for sweeping a new carpet with an old broom. I quite agree there may be cases in which there is real invention and discovery though an apparent application of an old principle; the best case for illustration is one in which, I believe, the patent was granted but the invention was not found practicable. About thirty years ago an ingenious man seeing the plastic nature of the dough of flour, and knowing that the Neapolitans spin all kinds of macaroni out of it very ingeniously, came to the conclusion that if he could only manage to take red hot iron almost melting he, by an analogous process, could spin gas-pipes, but the principle failed in practice; as might be supposed, it was rather a difficult thing to do. Nobody would have doubted if he had succeeded in it, that it would have been a very great invention. But there is no such invention here; it is merely saying the exact mode in which Mr. *Rattray* has been preserving his semi-cured meat is to be prohibited to him when it is applied to meat which is not cured at all. I must say it strikes me that would not be a good patent at all.

It now only remains for me to say that I think that the amendment which has been suggested in the interlocutor by the Lord Chancellor is a very desirable one; whether it would produce the practical result of doing any good or not I do not know. You will not be able to stop *Roberton* by it from doing what he has done now, but you will be able to stop him from packing in casks

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any perishable things, and I think it is fair that that should be done.

But there is, further, the objection taken that the specification does not describe the mode of application in a sufficiently practical way. I have more difficulty about that than about any other matter in the case, because I feel that men with common skill and common knowledge can take a hint very speedily and apply it. I am loth to say that the patent is bad on that account if one has not evidence about the novelty of it; but in the present case I am inclined to think that there is sufficient to shew that the patent is bad on that ground also. If the other facts are fatal it does not matter whether that is fatal or not.

I may add that one of the things which weighs in my mind is the extremely well-put interlocutor of the principal sheriff, *Dickson*, beginning, "Upon the question of fact the Pursuer contends," going down to the words "get the full benefit of it." The first part was adopted both by the Lord President and Lord *Shand*, and it contains the fullest summary of the reasons applicable to it (1).

On the whole, it strikes me that the result is this, that if there be an infringement of this invention as described in the full specification, it is an infringement of a part which is not within the nature of the invention as described in the provisional specification; and if it be a part, moreover, of the specification there is a failure to specify the means of doing it, and there is a want of novelty. Upon all these three grounds, and I think any one of them should be sufficient, I think the judgment of the Court below should be affirmed.

LORD GORDON concurred.

Judgment of the House.—Ordered and adjudged, That the interlocutor complained of be varied by omitting therefrom after the words "8/7 of progress" the following words, namely, "Find that the complete specification describes the nature of the invention claimed under the said first head, but does not describe or ascertain the manner in which the said invention

(1) Scotch Cases, 4th Series, vol. iv. at pp. 559, 560.

is to be performed: Find that in so far as regards the said first head of the claim, the complete specification is disconform to the provisional specification and claims a different invention from that which is disclosed in the provisional specification," and by inserting the following words, namely, "Find that the complete specification if large enough to cover the employment of bisulphite of lime for the preservation of animal substances as practised by the Defenders, would claim an invention larger than and different from that disclosed in the provisional specification and would be open to the objection of want of novelty and of want of a sufficient description of the manner in which the invention is to be performed." And it is further Ordered

That the said interlocutor, subject to the above variation, be affirmed; and that the said cause be, and the same is hereby remitted back to the Court of Session in *Scotland*, to do therein as shall be just and consistent with this variation and judgment: and

That the Appellants do pay to the Respondents the costs incurred by them in respect of this appeal.

Lords' Journals, 21st June, 1878.

Agent for Appellants: *J. Henry Johnson.*
Agent for Respondents: *Andrew Beveridge.*

[HOUSE OF LORDS.]

H. L. (Sc.) MATSON . . . . . APPELLANT;
1878 BAIRD & CO. . . . . RESPONDENTS.
July 5.

Railway, Private and Public—Level Crossing over Turnpike-Road—Gates—Reparation—Statutes 5 & 6 *Will.* 4, *c.* 50, *s.* 71—2 & 3 *Vict. c.* 45, *s.* 1—5 & 6 *Vict. c.* 55, *ss.* 9, 12, 21—8 & 9 *Vict. c.* 33, *s.* 69.

4 QBD 428
10 QBD 358

A private railway, on private property, made and used exclusively for the proprietors' own purposes, and not for passenger traffic, is not subject to the regulations as to gates and persons in charge at level crossings imposed by the Railway Statutes; nor are the proprietors bound at common law to erect such gates.

A horse escaping by night from a field, by no fault of its owner, strayed along a turnpike-road on to a private branch railway at a level crossing where there were no gates, or person in charge. The horse then proceeded down the branch to the junction with the main line, on which it was killed by a passing train:—

Held, that the proprietors of the private line, who could not have made the railway across the road on a level except with the leave or sufferance of the road trustees, (who could have imposed any conditions they thought right,) were not liable in damages, there being no obligation on them under the Railway Statutes to fence with gates the railway where it crossed the high road.

THE question here turned upon whether or not the Respondents, Messrs. *William Baird & Co.*, coal masters in *Glasgow*, were under any obligation, statutory or at common law, to have gates either at the level crossing of their private railway across a turnpike-road or at the opening of the railway fence, where their branch line joined the main line of the *North British Railway Company*. The facts of the case are as follows:—A valuable *Clydesdale* horse, the property of the Appellant Mr. *Matson*, cattle dealer, *Campsie*, escaped by night from a field, without any fault of its owner, and strayed along an adjoining turnpike-road for about two miles, and then got upon the private branch railway belonging to the Respondents, at a level crossing where there were no gates across the road, and no person in charge. The horse then proceeded down the branch line to the junction with the main line, along which it also strayed for some distance, and was killed by a passing train.

The branch railway, except where it crosses the road, is situated on property of the Respondents, who had no statutory powers to cross the road on the level, but were permitted to do so by the permission or sufferance of the road trustees. The branch railway was unfenced along its whole distance.

The Appellant, founding on the 5 & 6 Vict. c. 55, s. 9, and 8 & 9 Vict. c. 33, s. 69, and the common law, raised an action for damages against the *North British Railway* and against Messrs. *Baird*. The Sheriff of *Lanarkshire* (Mr. *Clark*), on the 10th of February, 1877, found that the *North British Railway Company* was under no obligation to fence the main line at its junction with the branch railway, or to put up gates on the branch railway at the level crossing, and that therefore no fault was established against them. But as regards Messrs. *Baird & Co.* the Sheriff found that they were bound to have gates at the level crossing and to have the same kept shut, and that they, failing to perform this duty, were liable for the value of the horse.

The Respondents appealed to the First Division of the Court of Session, who on the 9th of November, 1877, found in law that the death of the horse had not been caused by any fault or negligence of the Respondents, and recalled the Sheriff's interlocutor of the 10th of February, 1877, except in so far as it assoilzied the *North British Railway* from the conclusions of the summons (1).

On appeal to the House,

Mr. *Herschell*, Q.C., and Mr. *J. M. Collyer*, contended for the Appellant that the Respondents were under a statutory obligation to maintain good and efficient gates where their railway crossed the turnpike-road; and the death of the horse having been caused through the Respondents' failure to implement this obligation, they were liable to the Appellant for the value of the animal killed.

They admitted that they could not argue the case successfully on the ground that there was a liability at common law. They cited *Fawcett* v. *York and North Midland Railway Company* (2).

Their further argument is commented on in the opinions of the Law Peers.

(1) Scotch Cases, 4th Series, vol. v. p. 87. (2) 20 L. J. (Q.B.) 222.

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The Lord Advocate (Rt. Hon. *W. Watson*, Q.C.), and Mr. *MacClymont*, appeared for the Respondents, but were not called upon to address the House.

LORD CAIRNS, L.C.:—

My Lords, your Lordships have brought before you in this case an unanimous decision of the Court of Session in *Scotland*, and speaking for myself, and I think the opinion of all your Lordships is the same, I cannot see anything in their decision with which any fault can be found.

My Lords, I suggest to your Lordships that the decision should be affirmed, and for this simple reason. The Act of 5 & 6 Will. 4, c. 50, the *Public Highway Act*, which for this purpose extended to *Scotland*, must be looked at, as it seems to me, as a whole; and as I read that Act, there are, in the first place, in it a series of clauses which provide for the execution of his duty by the surveyor of highways; and then there are also a large number of clauses in a subsequent part of the Act which I may describe as intended for the protection of the highways of which he is the surveyor—clauses which arm him with a power to prevent things which would be nuisances to the highway and against which he could not protect himself, unless the power were given him by these sections. For example, there is a provision against encroachments upon the highways, and a power is given to the surveyor to take down the encroachments. There is a provision which prevents steam-engines and other machinery of a similar kind, which would have a tendency to frighten animals upon the highway, being erected within a certain distance of the highway, unless it is sufficiently screened. And there are penalties against persons committing nuisances by riding on the footpaths, by injuring the road, by damaging the banks, or by making fires and doing similar acts. All of these are clauses which the surveyor can put in force for the protection of the highway.

Then there comes the 71st section. It appears to me that it would be almost the introduction of an absurdity into the Act if that were held to be a section arming the surveyor of highways with power to regulate a railway crossing the highway, which railway was not there at all except by the consent of the surveyor

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or those who employed the surveyor—a railway which might have been forbidden altogether—a railway which, if allowed, would be allowed upon whatever terms those who allowed it thought it right to make. As I read the clause, it is a clause which deals with a railway which has been made, if I may use the expression, *in invitos* the guardians of the road. They have had by statutory power forced upon them, or they may after the Act has been passed have by statutory power forced upon them, a railway which they would rather be without, or which, if they would not rather be without it, they have no power to control. Dealing with a case of that kind, there is a general provision analogous to what is now made in the form of those *fasciculi* of clauses which are introduced into all Acts for the purpose of public undertakings. There is a general enactment that if a railway is under those circumstances authorized to be made across a highway, it shall always be accompanied with this provision, which is for the protection of the highway, that it shall be fenced by gates, and that those gates shall have certain persons to open and to shut them, under a penalty of £5 a day if that provision is not complied with. Now, my Lords, I repeat that it would seem to me little short of an absurdity for the Legislature to make provisions of this kind with regard to a railway which the guardians of the road might have refused to have upon any terms, or which, if they did not refuse to have it, they might themselves fence round by whatever terms they thought it right to introduce.

That, my Lords, was the view of the Court below; it appears to me to be the correct view; and, if so, it is quite sufficient to dispose of this case. I submit to your Lordships, therefore, that the appeal should be dismissed with costs.

LORD O'HAGAN:—

My Lords, I am quite of the same opinion. The Court below was unanimous in this case, and we should not disturb an unanimous decision unless there be strong reason for disturbing it.

The case was very ably argued by Mr. *Herschell* upon two grounds, first, with reference to the policy, and next, with reference to the terms, of the statutes.

As to the policy of the matter, I think the argument fails,

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because, if we consider that in the case of a private enterprise with which a statute does not interfere, the trustees of a road have perfect power to protect themselves and all others who are interested, and have a sufficient motive to be induced to protect the public, we see at once a sufficient distinction between that case and a case in which, contrary to the will of the persons having local interests, the Legislature comes in and forces a railway into a place where they may not at all desire it to come, and leaves them without protection from any action of their own. In the latter case it is exceedingly proper, and not only proper, but a matter of apparent necessity, that the Legislature should give protection where of its own accord, and as my noble and learned friend on the woolsack has said, *in invitos*, it may have introduced peril of a very serious character to life and limb in a particular locality. For my own part, I do not think that Parliament had any intention to give protection except where the protection was necessary, and where the necessity for protection was created by itself.

Then, my Lords, looking at the terms of the statutes, I agree with the learned Judges of the Court below, so far as I have heard their judgments read, that the clauses carry out the policy. Beginning with the first of these Acts, namely the 5 & 6 Will. 4, c. 50, we find in it the description of a railroad crossing a highway for carts or carriages, and it is enacted that "The proprietors of the said railroad shall make and maintain good and sufficient gates." Then we have the 2 & 3 Vict. c. 45, in which the words used are "whenever a railroad crosses," and so forth, "the proprietors or directors of the company of proprietors," shall do so and so. I think such phraseology points, not to any individual person using the railroad for his own exclusive individual benefit, but to what we in ordinary parlance understand as a company of proprietors incorporated under an Act of Parliament as companies are ordinarily incorporated. And when you come to the last of the Acts, on which the whole question arises, namely, the 5 & 6 Vict. c. 25, the thing is, if possible, a little stronger, because there the description of "the company" is left out altogether, and the words we have are "the proprietors or directors of the said railway." It is no doubt perfectly correct to say that, taking the words literally,

they would include individuals as well as a company, and private enterprises as well as public; but when you take together the mention of "the railway" and "the proprietors or directors of the railway," I think our common understanding of the English language, and our knowledge of what is going on every day in the Legislature and outside it, lead to the conclusion that the objects contemplated, in accordance with the necessity of the case, were to be carried out by the directorate of a company incorporated under an Act of Parliament, and not by private persons for private advantage.

It appears to me that such is the reason of the thing, and that it is in consistency with the terminology of the statutes, and I see no ground for disturbing the judgment of the Court below.

LORD BLACKBURN:—

My Lords, I am of the same opinion.

I think we must go back to the 5 & 6 Will. 4, c. 50, the *Highway Act* of *England*, and construe that first as the basis of all the rest and see what is meant by the word "railroad" in the 71st section of that Act. Now, long before that Act was passed, it was a very common thing to have roads from coalpits to carry away their produce, on which there were rails laid down, and the carriages ran along those rails. The earliest cases that I know which discuss or allude to them are cases in which questions arose as to whether or not they were rateable to the poor-rate; but they were very common at least a century ago in *Durham* and the districts all around, and also in *Gloucestershire*, I think. Now, all such railroads as that were subject to the common law. I take it that under the common law where there is a highway the inhabitants are liable to keep it in repair, and any one who does anything which is a nuisance to that highway is bound to pay for it. But it is no nuisance to cross a highway from either side, for each proprietor of adjoining land is perfectly at liberty to cross it provided he does no nuisance there. I do not think that the putting down of rails across a highway would necessarily be a nuisance; it might be, or it might not; such crossings of the highway were, I believe, very common long before locomotives were thought of. Then about 1826 or 1827 (I think it was), there came to be discovered

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and introduced the practice of running locomotive engines on such railroads as I speak of; and it being found that the only way conveniently to work them was to get statutable powers for the purpose, there arose a practice generally, though not necessarily, to incorporate a company for the purpose of working such railroads.

Upon that came the *Highway Act*, passed for the purpose of the highways, and it enacted in the 71st section that "whenever a railroad shall cross any highway for carts or carriages, the proprietors of the said railroad shall make and maintain good and sufficient gates at each of the said crossings." I think myself that the reason of the thing shews that the Legislature must have been using the term "railroads" in the new sense which the word "railroads" had acquired, namely, a railroad made by Act of Parliament for the purpose of carrying locomotives upon it or otherwise working it as a railway, and for this reason; such a railroad if it crosses a highway crosses it by virtue of a statutable authority; and therefore, however great a nuisance it might be, it would not be indictable according to the case of *Rex* v. *Pease* (1), and other authorities, because the Legislature had authorized it; and therefore very properly there was no other remedy whatever. The Legislature said in passing the *Highway Act*, We will put in this, that wherever it has been authorized by Act of Parliament to cross a highway there shall be this condition, and it is not a very severe condition to apply to a locomotive railway. But to say that when a person, using his common law power of crossing from side to ride of a highway, puts down any rails to take carriages along he shall be subject to this obligation, that he shall make and keep gates and two persons to open the gates, seems to me unreasonable. I think the true construction of the Act is that the word "railroad" in that Act meant the new sort of railroad made by authority of Parliament; I do not say whether for passengers or for goods; I suppose very few railroads were made by Act of Parliament which were not made for both at that time; however it would be a railroad made by authority of Parliament.

When once you get to that, the rest seems all to follow. The 2 & 3 Vict. c. 45, recites this enactment, and enacts that "wherever a

(1) 4 B. & Ad. 30.

railroad crosses or shall hereafter cross any turnpike road or highway, or statute labour road," which is equivalent in *Scotland* to a highway or turnpike-road in *England*, the same obligation is put on them. I think that if you take it that "railroad" in the first Act applicable to *England* meant railroad made by Act of Parliament, it is clear enough that in the 2 & 3 Vict. it means that also. Then comes the subsequent Act, which says that whereas in the Acts relating to certain railways it is provided that the gates are to be kept constantly closed across the railway except when engines or carriages are passing along the railway, that is to be changed and they are to be kept open except when a carriage or cart is coming across, in which case they shall be shut across the railway. It is upon the same principle as saying that the signal shall be kept at danger until you see all is quite safe, instead of saying that it shall be kept at safety until you see that there is danger. That is obviously a very convenient arrangement. It is quite unnecessary to form an opinion as to whether that is restricted to railways which carry passengers. It rather seems to extend to any railroad under Act of Parliament, whether carrying passengers or not. I do not give any opinion as to how that may be.

My Lords, that being so, I think the statutory obligation does not apply to such a railway as this, and consequently the Court of Session were perfectly right in their judgment.

LORD GORDON concurred.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 15th July, 1878.

Agent for the Appellant: *Andrew Beveridge.*
Agents for the Respondents: *Morten & Cutler.*

[PRIVY COUNCIL.]

J. C.* 1878 July 5.

THE ATTORNEY-GENERAL FOR QUEBEC, pro Dominâ Reginâ . . . . . } PLAINTIFF;

AND

THE QUEEN INSURANCE COMPANY . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR THE PROVINCE OF QUEBEC, CANADA.

Powers of Provincial Legislature—British North America Act, 1867, *s.* 92, *sub-ss.* 2–9 — *Quebec Act*, 39 *Vict. c.* 7 — *Licenses — Stamps — Direct Taxation.*

The clauses of Act 39 Vict. c. 7 (passed by the Legislature of *Quebec*), which impose a tax upon certain policies of assurance and certain receipts or renewals, are not authorized by the *British North America Act*, 1867, s. 92, sub-ss. 2, 9.

A license Act by which a licensee is compelled neither to take out nor to pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee but by the person who deals with him, is virtually a Stamp Act and not a License Act.

The imposition of a stamp duty on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed, is not warranted by the terms of an Act which authorizes the imposition of direct taxation.

APPEAL from a judgment of the Court of Queen's Bench above named (Dec. 14, 1877), affirming a judgment of the Superior Court for *Lower Canada* sitting at *Montreal* (April 12, 1877), whereby the Appellant's action and demand were dismissed.

The action was for the recovery of three penalties of $50·00 each, incurred under the provisions of an Act of the Legislature of *Quebec*, intituled "An Act to compel Assurers to take out a License," being chapter 7 of the Statutes of *Quebec* of 1875 (39 Vict.), which received the royal assent on the 24th of December, 1875, and enacts in effect that every assurer carrying on in the province of *Quebec* any business of assurance other than that

* *Present*:—Sir James W. Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, and The Master of the Rolls (Sir G. Jessel).

of marine assurance exclusively shall be bound to take out a license in each year, and that the price of such license shall consist in the payment to the Crown for the use of the province at the time of issue of any policy, or making or delivery of each premium receipt or renewal, of certain percentages on the amount received as premium on renewal of assurance, such payments to be made by means of adhesive stamps to be affixed on the policy of assurance, receipts, or renewals, and imposes for each contravention of the Act a penalty of $50.

The question decided in this appeal is whether such Act of the Legislature of *Quebec* is constitutional and within the powers conferred upon that Legislature by the Act of the Imperial Parliament, called the *British North America Act*, 1867.

The sections or portions of sections of the *British North America Act*, 1867, material to this question are the following:—

"Sect. 91. It shall be lawful for the Queen by and with the consent of the Senate and House of Commons to make laws for the peace, order, and good government of *Canada*, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of *Canada* extends to all matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"2. The regulation of trade and commerce.

"3. The raising of money by any mode or system of taxation.

"Sect. 92. In each province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:—

"2. Direct taxation within the province in order to the raising of a revenue for provincial purposes.

"9. Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes."

The material sections of the Act of the Legislature of *Quebec* are the following:—

"1. Every assurer carrying on in this province any business of

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assurance other than that of marine assurance exclusively, shall be bound to take out a license before the first day of May in each year from the revenue officer of the district wherein is situate his principal place of business, or head agency, and to remain continually under license.

"2. The price of such license shall consist in the payment to the Crown for the use of the said province, at the time of the issue or delivery of any policy of assurance, except of marine assurance, and at the time of the making or delivery of each premium receipt or renewal, respecting any policy issued before or after the coming into force of this Act, of a sum computed at the rate of 3 per cent. as to assurances against fire, or of 1 per cent. as to other assurances for each $100 of the amount received as premium or renewal of assurance, by the assurer, his agent or employee.

"And such payment shall be made by means of one or more adhesive stamps equivalent in value to the amount required, to be affixed by the assurer, his agents, officers, or employees on the policy of assurance, receipt, or renewal, as the case may be, at the time of drawing up, issue, or delivery thereof.

"5. Every assurer bound to take out a license under the present Act, for whom or in whose name any policy of assurance, or any premium receipt or renewal, shall have been delivered without the same having been stamped to the amount required, shall be liable in each case to a penalty not exceeding $50, or in default of payment, unless such assurer be a corporation, to imprisonment not exceeding three months.

"8. The word 'assurer' used in this Act, means and includes all persons, firms, corporations, and all companies, societies, or associations, whether incorporated or unincorporated, carrying on the business of assurance on life, or against fire or accidents, or the business of guaranteeing public functionaries or other employees, or any other assurance business whatsoever.

"10. The Act shall not affect any policy, premium receipt or renewal in relation to assurances wherever the interests assured are beyond the limits of this province."

The Respondent company is a corporation which carried on the business of insurance against fire in *Montreal*. It did not take out a license under the *Quebec Act*, 39 Vict. c. 7, but never-

theless issued three several policies of insurance mentioned in the declaration, and did not affix thereto the policy stamps required by the said Act.

The action was brought on the 21st of September, 1876, to recover the penalties provided by the Act, viz., the sum of $150 currency.

The Respondents by their plea, after pleading the *British North America Act*, 1867, also pleaded *Canada Act*, 31 Vict. c. 48, and alleged, and it was admitted to be the fact, that they had deposited in the hands of the Receiver-General of the Dominion of *Canada* in manner provided by the last-mentioned Act, and by the subsequent amendment of that Act passed by the said Parliament of *Canada*, $150,000 for the purposes in the said Act described, and had given all the notices, performed all the formalities, and conformed themselves in all respects to the provisions of the said Acts and of the Act amending the same, and that they had obtained a license from the Minister of Finance of the Dominion of *Canada*, and were thereby licensed to carry on their business in *Canada* of fire and life insurance, that the said license remained in force until the 31st of March, 1876, and was then renewed by the Minister of Finance of the Dominion of *Canada* under and by virtue of the statutes in such case provided, until the 31st of March, 1877, and that at all times mentioned in the said declaration the Respondents were the holders of the license and extension of license issued under the above-mentioned Acts of the Parliament of *Canada* authorizing them to transact business of insurance in any part of the Dominion of *Canada*.

The Respondents by their said plea prayed that the said provisions of the said Act of the Legislature of *Quebec* might be declared to be unconstitutional and illegal, and in so far as respects the Respondents that they might be annulled and set aside and declared to be of no force or effect.

The Appellant in his answer to the Respondents' plea admitted that the Respondents were entitled to transact the business of insurance, and had conformed to the laws of the Dominion Parliament actually in force, but had not conformed to the law of the provincial Legislature, and he also maintained that the said Act of the Legislature of *Quebec* was constitutional, and that the said

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Legislature had a right to pass it, and that it was then the law of the land.

From the notes of the reasons given by the learned Judges of the Court of Appeal, it appears that they agreed that the tax sought to be imposed was not a direct tax, and therefore did not come within sect. 92, sub-sect. 2 of the *British North America Act*, 1867.

Chief Justice *Dorion* considered that the tax was not within revenue raised by licenses under sub-sect 9, and that the Act of the Legislature of *Quebec* clashed with the provision of the *British North America Act*, 1867, giving the Dominion Parliament the exclusive right to make laws for the regulation of trade.

Mr. Justice *Monk* held that the provincial Legislature had not the power to impose licenses on insurance companies, no such power having been expressly given to it; and that the Dominion Legislature having exercised the power of licensing the Respondents, the provincial Legislature could not restrict the exercise of this power.

Mr. Justice *Tessier* considered that if the Legislature of *Quebec* had confined itself to imposing a license on insurance companies, such license might have been covered by sect. 92, sub-sect 9 of the *British North America Act*, 1867, and been within the "other licenses," there specified. But the Legislature he held had gone beyond its jurisdiction in imposing penalties on the companies, and declaring that policies issued without stamps should have no effect, and thus hindering the companies from carrying on operations which they were licensed by the Dominion Government to carry on within the provinces.

Mr. Justice *Taschereau* said the claim of the provincial Legislature was founded upon sect. 92, sub-sect. 9, of the *British North America Act*, 1867. This tax, however, was not a license duty but a stamp duty, the license being introduced only to make the legislation fit in with the sub-section. The revenue was raised, not from the license but from the stamps, and as the sub-section expressly provided that the license was to be in order to the raising of a revenue, this was not such a license as was contemplated. He also considered that the words "other licenses" were limited by the foregoing words, and that insurance companies could not be

said to be *ejusdem generis* with shops, &c. That if the provincial Legislatures had this power in regard to insurance companies they would have it in regard to banks, railway companies, &c., and under the form of a license their power of indirect taxation would become so great as to render unnecessary resort to direct taxation.

Lastly, he argued the company was a commercial company, and the Act in question was repugnant to the clause of the *British North America Act*, 1867, reserving the regulation of trade and commerce to the Dominion Parliament.

Mr. Justice *Ramsay* considered that the exclusive power of taxation given to the Dominion Parliament by the *British North America Act*, was to employ any mode or system of taxation for general purposes, and that the tax in question was a license to assurers in order to raise revenue for provincial purposes. This purpose being legal he held that it was immaterial how the assurer was repaid, and that the license came within the "other licenses" mentioned in sect. 92, sub-sect. 9.

Mr. *Benjamin*, Q.C., and Mr. *Rigby*, for the Appellant, contended that the provisions of the *Quebec Act*, 39 Vict. c. 7, did not conflict or interfere with the exclusive rights and powers of the Dominion Parliament. They referred to the *British North American Act*, 1867, sects. 91 and 92, which they contended were self-contradictory and very difficult of construction. The general scope of the Act is that the Dominion Parliament regulates public property, debt, and commerce. The general power of taxation, *i.e.*, the power of raising money for Dominion purposes, belongs to the Dominion Parliament. But special powers of taxation were also given to the provincial Legislature, and may co-exist with the more general powers of a similar class conferred on the Dominion Parliament. Those special powers when examined in detail shew the purpose of the Legislature. There is an express grant to the provincial Legislature (see sect. 92, sub-sect. 9), of a power to make laws relating to licenses, in order to the raising of a revenue for provincial, local, or municipal purposes. Having regard to sect. 129, it is necessary to refer to the powers of taxation granted by the Constitution of the *United States;* and on that

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subject, see *Hylton* v. *United States* (1), and License cases, *Thurlow* v. *Commonwealth of Massachussetts* (2). As to the legislation regarding licenses previous to the Act of 1867, and in reference to which that Act ought to be construed, see Consolidated Statutes, *Lower Canada*, p. 13, c. V.; and as respects the contention of the Respondent that it was an evasion to call this a license at all, see *Ibid.* pp. 13, 15, 22, 39, 44, 46. As regards the contention that the provincial Legislature was depriving the Respondent of rights conferred by *Canada Act*, 31 Vict. c. 48, that Act was a police regulation and not a Revenue Act, *cf.* English Act 34 Vict. c. 61. But if it were in contravention of the Dominion Act there was a power to disallow such statute, see *British North America Act*, 1867, sects. 56, 90. Reference was also made to 6 Geo. 4, c. 81; 6 Geo. 4, c. 58, s. 2.

But even if this be not a license tax within sect. 92, sub-sect. 9, of the Act of 1867, it was direct taxation under sub-sect. 2 of sect. 92. It is impossible to classify scientifically direct and indirect taxes. It depends in each case upon the surrounding circumstances whether an apparently direct tax turns out to be indirect in its operation or *vice versâ*.

Mr. *Kay*, Q.C., and Mr. *F. W. Gibbs*, for the Respondent company, were not called upon.

The judgment of their Lordships was delivered by

THE MASTER OF THE ROLLS (Sir *G. Jessel*):—

In this case their Lordships do not intend to call upon the counsel for the Respondents.

This is an appeal from a judgment of the Court of Queen's Bench in *Canada*, affirming a judgment of the Superior Court of the Province of *Montreal*. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of *Quebec*, 39 Vict. c. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized

(1) 3 Dallas, pp. 171, 182. (2) 5 Howard's Rep. pp. 504, 574.

by the Union Act of *Canada*, *Nova Scotia*, and *New Brunswick*, which entrusted the province, or the Legislature of that province, with certain powers. And the sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorize the statute which is under consideration?

It is not absolutely necessary to decide in this case how far, if at all, the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the sub-sections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is, whether what has been done is authorized by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local, or municipal purposes." The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the 2nd section, enacts what the price of the license is to be. And reading it shortly, it amounts to this: that the price of the license shall consist of an adhesive stamp affixed to the policy, or receipt, or renewal, as the case may be. The amount of the adhesive stamp is to be, in the case of fire, 3 per cent., and 1 per cent. for other assurances on the premiums paid. Then the 4th section enacts that anybody who, on behalf of an assurer, shall deliver any policy, or renewal, or receipt, without the stamp, shall be liable for such contravention to a penalty of $50. The 5th section says that every assurer bound to take out a license shall be liable in such a case to a penalty not exceeding $50 if it has been delivered without an adhesive stamp. The 6th section says that every person who affixes the stamp shall be

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bound to cancel it so as to obliterate it, and prevent its being used again. And the 7th makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be invoked, and shall have no effect in law or in equity before the Courts of this Province." Then there are certain sections of the *Quebec License Act* which are incorporated, and the Act is not to apply to assurances not within the province. The only provision of the *Quebec License Act* which it is necessary to refer to is the 124th: "For every license issued by a revenue officer there shall be paid to such revenue officer, over and above the duty payable therefor, a fee of $1 by the person to whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about

the price of a license, and merely leave the rest of the Act in, the Government of the province of *Quebec* obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt, or renewal; it is not a penalty for not taking out the license. The result therefore is this, that it is not in substance a License Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the Appellants, that though at first sight it might appear that this was not a license, and that this was not the price paid for a license, yet it could be shewn by the existing legislation in *England* and *America* that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of the trade he did. This is not a payment depending in that sense on the amount of the

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trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out, and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal, or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the province in order to the raising of a revenue for provincial purposes." The single point to be decided upon this is whether a Stamp Act,—an Act imposing a stamp on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt, in a Court of Law, if the stamp is not affixed,—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the Courts of Law. Taken in either way there is a multitude of authorities to shew that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice *Taschereau* in his elaborate judgment it is not necessary here to do more than refer to. But surely if one could have been found in favour of the Appellants, it was the duty of the Appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice *Taschereau*. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the Appellant.

Lastly, as regards the popular use of the word, two cyclopædias at least have been produced, shewing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here, again, there is an utter deficiency on the part of the Appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words used in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the Legislature of *England* to include it in the term "direct taxation," and therefore that the imposition of this stamp duty is not warranted by the terms of the 2nd sub-section of sect. 92 of the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

Solicitors for the Appellant: *Bischoff, Bompas, & Bischoff.*
Solicitors for the Respondent: *Wilde, Berger, Moore, & Wilde.*

[PRIVY COUNCIL.]

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LES SŒURS DAMES HOSPITALIÈRES DE ST. JOSEPH DE L'HÔTEL-DIEU DE MONTRÉAL . . . . . } PLAINTIFFS;

AND

JOHN ROLLO MIDDLEMISS . . . . . DEFENDANT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA IN THE PROVINCE OF QUEBEC.

Feudal Tenures in Lower Canada—Feudal Rights of the Seignior extinguished in Lands acquired by the Crown—Indemnity payable to the Seignior

5 App Cas 138 144

By the law of feudal tenure in *France* subsequently introduced into French *Canada*, and thereafter continued by virtue of the *Quebec Act* as the law of *Lower Canada*, the acquisition by the Crown of lands held from or under a seignior as part of his fief extinguishes all feudal rights in those lands and gives to the seignior a mere right of indemnity.

By the law as it existed up to the time of the Ordinance of *Louis* XIV. in 1667, in reference to which law the parties in this case contracted, the amount of that indemnity, when not determinable by legal custom or written law, was in the case of land held by *roturiers* one-fifth of the price.

APPEAL from a judgment of the above-mentioned Court (Dec. 22, 1877), whereby two judgments of the Superior Court, viz. an interlocutory judgment (May 31, 1876), and a final judgment (Sept. 2, 1876), were respectively reversed.

The facts of the case, including a history of the devolution of the property in reference to which the claim arose, are sufficiently set forth in the judgment of their Lordships.

On the 3rd of November, 1874, the Appellants presented a petition to the Judges of the Superior Court for *Montreal*, wherein, after stating that they were seigniors of the fief *St. Augustin*, and the facts relating to the conveyance of a certain piece of land by Her Majesty to the Respondent on the 1st of July, 1874, and alleging that such conveyance was the first mutation of the property in the piece of land which would have created *lods et*

* *Present*:—SIR JAMES W. COLVILE, SIR BARNES PEACOCK, and SIR ROBERT P. COLLIER.

ventes since the 19th of May, 1860, and setting out the notice given by the Appellants of their appointment of *Michel Laurent* as arbitrator, and that the Respondent had made default in naming an arbitrator on his part, they prayed *acte* of the nomination which they had made of *Michel Laurent* as their arbitrator to fix and determine the value of the piece of land in order to arrive at the amount of the indemnity due to the Appellants in lieu of their seigniorial rights upon the said land, and the amount to be paid for the redemption of the *rente constituée* representing the *cens et rentes* to which the said piece of land was subject, and concluded by praying that the Court would name the same person, or some other disinterested person, in the place of the Respondent, in order that he might proceed to the same object: the whole, with costs against the Respondent, the expenses of the arbitration to be divided.

The Respondent by his answer (as subsequently amended) alleged that the land in question had been acquired by the Crown by the notarial deeds of the 8th of October, 1839;—that about 1844 the trust thereby acquired became extinguished, and the Crown had re-united the land to its domain, and had begun from that date to possess, and had ever since possessed, the same as owner down to the conveyance thereof to the Respondent, and that the Appellants had treated from that date the Crown as owner of the land, and had claimed the indemnity *qui leur était due comme seigneuresses sur ledit immeuble, ainsi passé en main-morte;*—they further alleged the deed of the 14th of January, 1861, and the death of *William Robertson*, and added, that on or about the 20th of April, 1860, the Crown had paid the Appellants an indemnity agreed upon between them, by reason whereof the said property had ceased to be subject to seigniorial dues;—that, in consequence of the acquisition by the Crown of the said property and of the payment of the said indemnity, the property had been re-united to the domain of the Crown;—that, by the Act of the Legislature of the former province of *Canada* (23 Vict. c. 60), assented to on the 18th of May, 1860, all seigniorial dues were abolished in the fief *St. Augustin;*—that at the time of such abolition the property was still in the possession of the Crown, and free from any seigniorial *mouvance;*—that the mutation by which the

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property came into the possession of the Respondent on the 1st of July, 1874, was not a mutation which would have created *lods et ventes*, because the said property had been separated from the fief *St. Augustin*, and, supposing even that under the old law it could have been brought within it again, this could not take place after the abolition of the seigniorial tenure.

That, under these circumstances, no commutation fine was due to the Appellants by reason of the acquisition from the Crown by the Respondent, and there was, accordingly, no ground for an arbitration.

He therefore concluded by praying that the petition might be dismissed with costs.

The Appellants, in their replication, admitted that the parcel of land had been acquired under the two deeds of the 8th of October, 1839, by the aforesaid *Robertson* and *Montizambert*, in trust for the Commissioners of the lunatic asylum, and that the Government of the province of *Canada* had succeeded to the Commissioners; and that the Government of the former province of *Canada* had paid the Appellants a sum of £172 16*s.* 9*d.*, as indemnity, calculated upon the purchase-money, being one-fifth of the purchase-money less one-tenth, but that the indemnity had not been fixed by the parties, seeing that the Appellants had not admitted the deduction of the one-tenth, and had claimed the *lods et ventes* upon the acquisition, which had been refused them; that the indemnity paid represented only the indemnity which all ordinary persons in mortmain paid when they acquired immoveables; that such indemnity had not the effect of putting an end to the *mouvance*, but only of suspending the rights of the Appellants, as seigniors of the fief, as long as it remained in the hands of the Government: that the land had been acquired by *Robertson* and *Montizambert*, subject to all seigniorial dues, and that it had always been held by this title, saving indemnity for putting it in mortmain.

The account at page 24 of the record (referred to in their Lordships' judgment, and during the argument) was as follows:—

"SCHÉDULE No. 13.

"LE GOUVERNEMENT PROVINCIAL," Dr.

"*Pour lods et ventes sur son acquisition des héritiers et représentants de feu Wm. Hallowell par deux con-*

trats passés devant Mtre. Joseph Guy & Collègue, Notaires, le 8 octobre 1839, au Dr. W. Robertson et Chas. N. Montizambert, Ecuiers, acquéreurs pour et au profit des Commissaires de l'Asile des Aliénés, d'un terrain sur le Coteau St. Antoine, dans le fief St. Augustin, contenant 27 arpents, 43½ perches en superficie, à raison de £35 par arpent. formant pour prix de vente £960 4 6 . £ 80 0 4

"*Pour droit d'indemnité sur le susdit prix de vente* . 192 0 10

£272 1 2

"*Pour* 13 *ans de rente foncière échus le* 29 *septembre* 1857 *à* £2 19 8 *par an* 38 15 8

"*Pour deux ans de la même rente échue le* 29 *septembre* 1859 . . . . . 5 19 4

£316 16 2"

"SCHÉDULE No. 14.

"No. 2.—*Montant payé par le Gouvernement.*

"*Août* 20.

"*Payé par le Gouvernement par une traite du Receveur-Général datée du* 13 *courant, sur la Banque du Haut-Canada* £217 11 9

"*qui se divise comme suit: Indemnité réclamée* 192 0 10

"*Moins* 1/10 . . . . . 19 4 10

£172 16 9

"13 *ans de rente foncière* . 38 15 8

"2 *do* . 5 19 4

£217 11 9"

On the 31st of May, 1876, Mr. Justice *Torrance* pronounced an interlocutory judgment of the Superior Court overruling the answer of the Respondent, and granting the Appellants *acte* of their nomination of *Michel Laurent* as their arbitrator, in order to fix and determine the value of the land in question, to wit, the lot of land bearing the number 1434 of the official plan, and in the

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book of reference of the municipality of the parish of *Montreal*, in order to establish the amount of indemnity due to the Appellants in place of the seigniorial rights on said land, and the amount to be paid for the redemption of the constituted rents representing the *cens et rentes* to which such land was subject, and further naming one *Damase Masson* (for whom one *J. J. Arnton* was afterwards substituted) for the Respondent as arbitrator, to establish said amount jointly with said *Michel Laurent*.

The arbitrators made their report to the Superior Court, and that Court by a final judgment of the 2nd of September, 1876, homologated the report, and declared the value of the land on the 1st of July, and during all the summer of 1876, to be $169,592 40*c*., and the amount to be paid for the redemption of the constituted rent representing the *cens et rentes* to which the land was subject to be $7 40*c*.

The judgment of the Court of Queen's Bench (*Dorion*, C.J., *Ramsay*, and *Cross*, JJ., *Monk* and *Tessier*, JJ., dissenting), was based upon the following grounds:—

(1.) That by the conveyance of the 8th of October, 1839, the piece of land in question had been acquired for an object of public utility and with the moneys of the Crown, and that the effect of such acquisition was to unite the piece of land in question to the domain of the Crown, and to free it for ever from all seigniorial rights and obligations towards the seigniors of the fief *St. Augustin*, saving only their right to an indemnity for the loss of the seigniorial rights over the said piece of land.

(2.) That the payment by the Government of the sum of £192 0*s*. 10*d*., less one-tenth, by way of indemnity, was in satisfaction of and operated to extinguish the seigniorial rights.

The Court of Queen's Bench accordingly held that the conveyance of the 1st of July 1874, was not one which, if it had been made before the 19th of May, 1860, could have given rise to a right of *lods et ventes*, and consequently that there was no right to commutation under the Consolidated Statute 41 Vict. sect. 74.

Mr. *Benjamin*, Q.C., and Mr. *Kenelm E. Digby*, for the Appellants, said that seigniorial dues were of two classes: (*a*) *cens et rentes*, in reference to which rent-service might be taken as the

nearest English equivalent: see *Pothier, Traité des Cens*, § 1; (*b*), casual dues (*lods et ventes*), which were due from a purchaser to a seignior on completion of a purchase: see *Pothier, Traité des Cens*, Nos. 29, 30. In the present case the question was whether or not the Appellants were entitled under the *Lower Canada* Statutes, whereby seigniorial rights were abolished and compensation provided in their place, to any sum from the Respondent in respect of such compensation. They referred to Cons. Stat. *Lower Canada*, c. 41, sect. 74, and following sections, which contain special provisions taken from 23 Vict. c. 60, relating to the abolition of feudal rights and duties.

In substance the important provisions are as follows:—All seigniorial dues, comprising, among others, *cens et rentes* and *lods et ventes*, were abolished in the fief *St. Augustin* on the 19th of May, 1860. The *cens et rentes* were converted into a *rente constituée*, which was made, like the *cens et rentes* themselves, a charge on the land, and in lieu of the *lods et ventes* it was provided that a commutation fine should be payable to the seigniors of the fief *St. Augustin* on the first mutation which would have created *lods et ventes* during twenty years next after the 19th of May, 1860. (Sect. 74.) It was further enacted that on the expiration of the said twenty years the commutation fine should become payable to the seigniors of the said fief on all property therein not then commuted. (Sect. 75.) Provision was also made for the commutation of the *rente constituée*, representing the *cens et rentes*, and it was provided that such commutation should be payable at the same time as the commutation fine representing the *lods et ventes*. (Sect. 78.) Provision was also made for ascertaining the amounts of the commutation by means of arbitrators, one of whom was to be appointed by the seignior, and one by the owner, or, in default of such appointment by the owner, by a Judge of the Superior Court. (Sect. 69.)

Under Canadian law as it existed before the abolition of seigniorial tenures *cens et rentes* consisted in the annual render of a sum of money, usually of a nominal amount, by the *censitaire* or tenant of lands as an acknowledgment of his tenure ("*en reconnoissance de la seigneurie du seigneur de qui ils sont tenus*"): see *Pothier, Traité des Fiefs*, § 1; *Traité des Cens*, §§ 1, 5. When

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this relation of *seigneur* and *censitaire* existed, the *seigneur* was entitled as of right to certain casual dues called *lods et ventes*, on the occasion of a sale of land or a transaction equivalent to a sale by the *censitaire*. This sum was equivalent to one-twelfth of the price; it was due from the purchaser to the seignior, and constituted a charge on the land: see *Pothier, Traité des Cens*, Nos. 29, 30; *Traité des Fiefs*, Nos. 410, 411.

Upon the evidence the deed of exchange of the 1st of July, 1874, constituted the first mutation of the ownership of the property which would have created *lods et ventes* after the 19th of May, 1860, within the meaning of Cons. Stat., c. 41, s. 74; for under the Canadian law as it existed before the 19th of May, 1860, a conveyance *à titre de soulte et retour* would have given rise to *lods et ventes*: *Pothier, Traité des Cens*, No. 33. The Appellants therefore, under c. 41, s. 74, cited above, were entitled to a *rente constituée* and a commutation fine, and those had never been received.

With regard to the contention of the Respondent to the effect that the property had been united to the royal domain before the 19th of May, 1860, and that therefore no right to commutation existed under Consol. Stat. c. 41, s. 74, they denied that even if the effect of the deeds of the 8th of October, 1839, had been as contended, it would have followed that the seigniorial rights of the Appellants had been extinguished for ever. The contention on the other side must be that under Canadian law the mere acquisition by the Crown of land within a seigniory extinguishes all the valuable rights of property possessed by the seignior. The Ordinance of *Louis* XIV. relied upon on the other side as declaratory of the common law, expressly avers that the seignior has no right to any compensation or indemnity, and that such indemnity shall in future be granted as a matter of grace not of right. If this were the state of French law at the time of the conquest of *Canada*, it is contended that a rule of law whereby an acquisition of land by the Crown would have the effect of depriving a subject of his property would be contrary to the principles of the constitution, and consequently would be held not to have been imported into *Canada*. See *Forsyth's* Cases, p. 153. If, however, recourse is to be had to the common law of *France*, we find that in its earlier

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stage it did recognise the rights of the seignior as still existing in land which had been acquired by the Crown. This recognition was usually made in one of these ways, either by the king appointing an officer to render to the seignior all seigniorial dues in lieu of the king, or by the king yielding the property to a subject as *censitaire*, or by the payment of an indemnity by the king to the seignior in consideration of the loss of seigniorial rights for the time that the property remained in the hands of the Crown. Reference was made to *Guyot's Répertoire*, tit. "*Domaine*," p. 67; Ord. de *Charles* IX., Edict. of 1566, *Ib.*, p. 72; Edict of *Louis* XIV. April, 1667 (*Coll. de Néron*, vol. ii. p. 86); *Nouveau Denizart*, tit. "*Domaine de la Couronne*," sec. 3, p. 596, Edict of *Louis* XIV., p. 599; 22 Vict. c. 48, s. 11 (*cf.* Consol. Stat. c. 41, s. 66, sub-sec. 5; 2 Vict. c. 21; 7 Vict. c. xi. ss. 9, 28, 29). But in fact the title of the Crown cannot be put further back than the conveyance of the 14th of January, 1861, when nine-tenths were conveyed by *Montizambert* to the Crown after the abolition of seigniorial rights, and after the payment of the indemnity in April, 1860. The deeds of 1839 were not to the Crown but to a mortmain; and the deed of January, 1861, it was submitted, could not operate to defeat a right to commutation which vested in the Appellants on the 19th of May, 1860, in lieu of their seigniorial rights, and was expressly recognised and reserved by the very terms of the deed.

With regard to the nature of the indemnity claimed and paid in this case, it never was intended to operate by way of extinction of the seigniorial rights of the Appellants. The right to indemnity accrued to the Appellants on the occasion of the conveyances to *Montizambert* and *Robertson*, and not because the land came into the possession of the Crown. In fact, the claim was based upon the Canadian law as it existed before the abolition of seigniorial tenures, according to which an indemnity was due to the seignior for the loss of seigniorial dues which resulted from a conveyance of land held by a private owner *en commerce* to a *main-morte* for the time during which such land remained in the possession of the *main-morte*. The trustees to whom this property was conveyed by the deeds of the 8th of October, 1839, would under French and Canadian law be deemed a *main-morte*, and the

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property conveyed to them would, so long as it remained devoted to the objects specified in the said deed, be regarded as *hors du commerce.* The Government paid the *indemnité réclamée,* which as per account was a mortmain indemnity, was so admitted to be in Respondent's answer, and moreover was not in amount the same as would have been payable by the Crown under the Ordinance of *Louis* XIV. already mentioned. The authorities shew that when such property comes back into commerce, the rights of the seignior revive, and that the right to an indemnity accrues afresh in the case of a conveyance from one *main-morte* to another. Reference was made to *Pothier,* "*Prescription,*" No. 275; *Ancien Denizart, vo.* "*Main-morte,*" *vo.* "*Gens de main-morte.*" According to French law an indemnity is due as well for the loss of seigniorial dues as for the loss of *lods et ventes:* see *Guyot, vo.* "*Main-morte,*" p. 149, as to amount of indemnity due by the *main-morte,* viz., one fifth of the price and the *lods et ventes.*

Mr. *North,* Q.C., and Mr. *F. W. Gibbs,* for the Respondent, contended, first, that the property in question in this case had been united to the royal domain before the 19th of May, 1860; secondly, that by reason thereof all seigniorial rights and dues had been extinguished before that date, and therefore no right to commutation thereof arose under the provisions of Consol. Stat. c. 41, s. 74. With regard to the first point, it was common ground in the Court below that the Crown acquired its title before May, 1860; it is a new point first taken in this appeal that that title accrued only under the conveyance of the 14th of January, 1861. What was acquired at this last-mentioned date was not the title, but the possession: see *Pothier,* "*Prescription,*" No. 275, vol. viii. of collected works, p. 516. The evidence substantiated the Respondent's case, which had been from the first that the Crown acquired title by the notarial acts or deeds of the 8th of October, 1839, and that this acquisition reunited it to the domain of the Crown, and extinguished the *mouvance* which made it subject to the fief *St. Augustin,* and freed it from all seigniorial rights. The property was acquired in the name of a trustee for purposes of public utility, that is to say, for the Commissioners for the erection of a lunatic asylum in *Montreal.* Reference was

made to 3 Geo. 4, c. 25, which created a body of Commissioners to administer the funds to be appropriated for the insane at *Montreal* (see sects. 2, 5), the due application of which was to be accounted for to His Majesty and his successors. The Crown became entitled to the property, and no distinction can be raised between the Colonial Government and the Crown in respect of this question: see *Kierzkowski* v. *Grand Trunk Railroad Company of Canada* (1). The Commissioners disappeared in 1843 or 1844, apparently superseded by the Board of Works, which was established by 4 & 5 Vict. c. 58, s. 13.

With regard to the second point: the property having been united to the royal domain, and the indemnity of the 20th of April, 1860, having been paid, the seigniorial rights, compensation for which is now claimed, were extinguished, and were not merely suspended so as to revive as claimed under the exchange effected with the Respondent on the 1st of July, 1874. As to the French law and the rights of the Crown in such case, reference was made to the Edict of *Charles* IX. (1566); *Isambert*, vol. xiv. p. 185; *Guyot's Répertoire*, tit. "*Indemnité*," p. 148: "*Lorsque le Roi acquiert des immeubles à quelque titre qui ce puisse être, les mouvances particulières sont éteintes.*" See also pp. 163, 165; see especially an *arrêt* of 1679 in the case of *La terre de Bohin; Hervé*, vol. vi. p. 628; *Augeard, Arrêts Notables*, vol. ii. pp. 71, 84; *Nouveau Denizart*, tit. "*Domaine de la Couronne*," pp. 596, 599; *Bacquet, Traité des Droits de Justice*, vol. i. p. 60. Reference was also made to the 53rd Article (*titre* 1, "*Des Fiefs*") of the *Coutume de Paris*: "*Les héritages acquis par un seigneur de fief en sa censive sont réunis à son fief et censéz féodaux, si par exprès le seigneur ne déclare qu'il veut que les dits héritages demeurent en roture.*" With regard to such a claim being made under English law, see *Co. Litt.* p. 1 b.; *Co. Litt.* 64 b, for the form of fealty and homage.

Reference was also made to *Grant* v. *Officers of Artillery* (2) to shew that property acquired for public purposes was not subject to *lods et ventes;* and to *Guyot's Répertoire, vo.* "*Indemnité*," p. 169, c. 1, p. 165, c. 2, to illustrate the difference between land passing

(1) 8 Low. Can. Rep. p. 31. (2) 1 Low. Can. Rep. 91.

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to the Crown and land passing to a *main-morte* as regards the claim to indemnity. See also *Hervé*, vol. vi. p. 625.

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Mr. *Digby* replied.

July 12. The judgment of their Lordships was delivered by

SIR JAMES W. COLVILE:—

This case has been argued with great learning and ability on both sides. The question, however, between the parties is reducible within narrow limits; and that question having been very fully argued, and their Lordships having had an opportunity of considering the authorities cited, they do not think it necessary to reserve their judgment.

The Appellants are a religious community known as *Les Religieuses Sœurs Hospitalières de St. Joseph de l'Hôtel-Dieu de Montréal*, and are the seigniors of a fief in *Montreal* known as the fief *St. Augustin*. The Respondent is the present proprietor of a piece of land within the ambit of that fief, and at one time unquestionably held it subject to the feudal rights then incident to such a tenure. The proceedings out of which this appeal has arisen were taken by the Appellants in order to recover from the Respondent, as owner of this land, the commutation fine to which, as they allege, they were upon the transfer thereof entitled under the 74th and following sections of chapter XLI. of the Consolidated Statutes of *Lower Canada*, intituled "An Act respecting the general abolition of feudal rights and duties." The 74th section is as follows: "In the fief *St. Augustin* . . . . *lods et ventes*, and other casual dues including *droit de banalité* and all seigniorial dues whatever, were abolished on the 19th day of May, 1860, and instead thereof the *cens et rentes* have since that day been and shall be represented by a *rente constituée* of the same amount (in money or kind, as the case may be), secured by the same privileges, and payable at the same periods, until the capital thereof becomes payable as hereinafter provided; and a commutation fine equal to that to which the seminary of *St. Sulpice* of *Montreal* is entitled, in the city and parish of *Montreal*, and to be calculated and ascertained in the manner prescribed by chapter 42 of these Consolidated Statutes respecting the said seminary, and by the

69th section of this Act, subject to the provisions hereinafter made in section 84 of this Act, as to the rate of commutation according to the situation of the property, shall be payable to the seigniors of the said fief, or any portion of it, on the first mutation which would have created *lods et ventes* of the ownership of any property happening in the . . . fief *St. Augustin* . . . during the twenty years next after the said day." Upon the transfer to the Respondent of this piece of land in 1874, the Appellants conceived that the period prescribed by the statute as that at which they would be entitled to the commutation fine had arrived, and accordingly, in conformity with the procedure prescribed by the statutes for ascertaining the amount thereof, they called upon the Respondent to appoint an arbitrator. He refused to do so. They then took the next step prescribed by the statutes, and petitioned the Court to appoint an arbitrator on his behalf. A defence was raised to that claim, which will be afterwards considered. The result was that the Superior Court upheld the claim and appointed an arbitrator. The amount of the commutation fine was afterwards ascertained in due course, and a decree made accordingly. Against those two decrees of the Superior Court there was an appeal to the Court of Queen's Bench, the Judges of which were divided in opinion, but the majority held that the proceedings had been irregular from the beginning; that no arbitrator ought to have been appointed, and that the application of the Appellants ought to have been dismissed. This appeal is against their decree.

Before considering the merits of the case, it may be well shortly to recapitulate the history of the devolution of this property. In 1805 it seems to have been vested in one *William Hallowell.* In his hands it was subject, not only to the seigniorial dues, but to certain reserved rents and other charges, conventions, and servitudes which were expressed in a deed of accord of the 9th of October, 1805. On *Hallowell's* death his interest in the property became divisible amongst his wife and children, and, by two notarial deeds of the 8th of October, 1839, respectively, one-tenth of that interest was duly conveyed to and became vested in one *William Robertson,* the remaining nine-tenths being in like manner conveyed to and vested in one *Charles Montizambert,* each of whom

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accepted as purchaser in trust for the Commissioners appointed for the purpose of erecting a lunatic asylum in the said district of *Montreal*, and their successors, and with an obligation on his behalf to reconvey in a due manner unto the said Commissioners and their successors, so soon as they should be duly authorized to accept a deed to that effect, the undivided part conveyed to him of the said property. It appears that, under a colonial statute, public money had been appropriated to certain persons as Commissioners generally for charitable purposes connected with lunatics, and that there was then an intention at least of making those persons a corporation capable of holding land. The purchases were unquestionably made with the public moneys so appropriated to the Commissioners. Nothing, however, was afterwards done to constitute them a body corporate, or to authorize them to hold lands; and it appears—though it is not very distinctly shewn when—that some time between 1841 and 1844 they ceased to exist, and that the Government of *Canada* was then in possession of the land. The next transaction in order of date is that of the 20th of April, 1860, and, as will afterwards be shewn, it is upon the true effect and nature of that transaction that the determination of this appeal now almost admittedly depends. Before and about that time various statutes had been passed with the object of abolishing all feudal rights of the seigniors, and of giving to the tenants a free allodial tenure. The statute, however, which related to this particular fief was not passed until the 19th of May, 1860, and was one of several that were embodied in the Consolidated Statute, chapter 41. On the 14th of January, 1861, after the statute had come into effect, a notarial act was passed between *Montizambert*, who held nine-tenths of the property under the trusts already mentioned, and Her Majesty the Queen, represented by the Honourable *John Rose*, described as a Commissioner of Public Works, by which the nine-tenths of the property vested in *Montizambert* were formally conveyed to the Crown. That deed contains a recital in the words: "And whereas the property hereinafter described was never conveyed to the Commissioners for the erection of a lunatic asylum in the district of *Montreal*, that such Commissioners have ceased to exist, and that by the laws in force in this province the said property, having been paid for out of the

provincial funds, should be vested in Her Majesty, her heirs, and successors, and be under the management and control of the Commissioner of Public Works for the time being." There is no trace in the record of any transfer of what English lawyers would call the outstanding legal estate of the remaining one-tenth from *Robertson* to the Crown; but there is no doubt that the Crown had long been in possession as well of that, as of the other nine-tenths, and in fact continued to be in possession of the whole property up to the 1st of July, 1874. At that date it passed from the Crown to the Respondent by means of an exchange *à titre de soulte et retour*, and it is admitted that if that transaction had taken place between subjects it would have been such a mutation of property as would have created *lods et ventes* within the meaning of the 74th section of chapter 41 of the Consolidated Statutes.

That being so, what was the defence made by the Respondent to the Appellants' claim? His first answer to their petition is at page 21 of the Record. The Appellants put in their reply, whereupon the Defendant obtained leave to file an amended answer, and the reply was ultimately taken to be a reply to that amended answer. Mr. *Digby* has to-day drawn their Lordships' attention to some supposed distinctions between the two answers, but their Lordships cannot see that there is any difference between them which materially affects the question now to be decided. They will therefore confine their attention to the last answer. That is to the effect that the property in question had been acquired by the Crown by the notarial acts of the 8th of October, 1839; that by those acts it was established that the property in question was acquired in the name of a trustee ("*en fidei-commis*") by the Commissioners for the erection of a lunatic asylum in the district of *Montreal*, with the money of the Crown appropriated to that object; that the commission of these Commissioners having expired about the year 1844 without their ever having effected the erection of the asylum, and the Commissioners having consequently ceased to exist, the trust was extinguished, and the Crown united the property to its domain, and then began to possess and afterwards continued to possess it as proprietor up to the time of the alienation in favour of the Respondent *Middlemiss;* and further

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that the Appellants had since that time treated the Crown as proprietor of the property, and had claimed the indemnity which was due to them as seigneuresses upon the said property, "*ainsi passé en main-morte.*" Their Lordships here pause to consider an argument which has been founded upon the words "*ainsi passé en main-morte.*" They think that the words "thus passed *en main-morte*" cannot fairly be taken to import more than that the property had passed *extra commercium* under the circumstances above stated; and that if those circumstances do not support the conclusion that it had passed into hands which were in the strict sense of the term those of *gens de main-morte,* the Respondent ought not to be held to have made an admission to that effect because his pleader has used in a loose way the term *main-morte* instead of that which *Hervé,* writing with precision, in his definition of "*Indemnité,*" advisedly substituted for it, *viz., une main qui n'aliène point.* In the following passage he thus explains the use of those words: "*Je dis en général aussi, une main qui n'aliène point et non pas simplement une main-morte, parce que le Roi qui n'est pas mis dans la classe des mains-mortes doit néanmoins une indemnité aux seigneurs dans la mouvance desquels il acquiert,*" and then he proceeds to deal with the indemnity payable in the one case by *gens de main-morte,* properly so termed, and in the other by the Crown. The answer goes on to say that, on or about the 20th of April, 1860, the Crown had paid to the petitioners an indemnity agreed upon between them by reason of the said property having ceased to be subject to seigniorial rights; and that by reason of the acquisition by the Crown of the said property, and the payment of the said indemnity, that property was united to the Sovereign's domain and ceased to be subject to any *mouvance particulière.* The reply of the Appellants admits to a certain extent the facts pleaded by the Respondent. It admits that the land had been acquired by virtue of the two notarial deeds in trust for the Commissioners, to which Commissioners the Government of the province of *Canada* had afterwards succeeded; it also admits the payment of the sum alleged to have been paid by way of indemnity, being one fifth of the sum less a tenth, but says that that indemnity was not fixed and agreed upon by the parties, because the petitioners did not acknowledge the propriety of the

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deduction of the tenth, and further claimed *lods et ventes* on the purchase of 1839, which had been refused by the Crown. It then states what is in fact the real issue between the parties, *viz.*, that the indemnity paid represented only that indemnity which was payable by all *mains-mortes* when they acquired immoveable property; that the effect of the payment was not *résoudre la mouvance, i.e.*, to put an end to the tenure, but merely to suspend the rights of the seigniors so long as the property remained in the hands of the Government, and that it had been acquired by *Robertson* and *Montizambert* subject to all seigniorial rights, and so continued to be, except so far as related to the indemnity *pour amortissement.* The Appellants with their reply filed the account at page 24 of the Record, which is really the only evidence in the cause of the transaction in question. Their Lordships have felt, during the greater part of the argument, that the crucial question in the case was which of the constructions put by the parties respectively upon that transaction was correct; or in other words, *quo animo* did one party pay and the other receive the indemnity mentioned in the account. To that question they will now address themselves.

The case for the Respondent involves two questions, one, a question of law, and the other a question of fact. The question of law is, whether by the law of *Lower Canada* the acquisition by the Crown of lands held from or under a seignior as part of his fief, did extinguish all feudal rights in those lands, and give to the seignior a mere right to an indemnity. The question of fact is, whether the transaction evidenced by the document at page 24 took place upon that footing. Those questions more or less run into each other, because it must be presumed that the parties dealt with each other with reference to the subsisting law, and the construction of the document, in so far as it is ambiguous, will therefore be facilitated by a consideration of what that law was.

Their Lordships do not think it necessary to go in great detail through the many authorities which have been cited in the *facta* of the parties, in the reasons of the Judges or at the bar, as to what the law of *France*, and, consequently, the law of *Canada*, was upon that point. They have come to the conclusion that

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those authorities do establish that (whatever may have been the case in earlier times, when the kings of *France* seem occasionally to have submitted to do homage by attorney or otherwise, for acquisitions in the fiefs of subject seigniors,) for a considerable time, probably very soon after the Edict of *Moulins*, passed in the reign of *Charles* IX., there was an end of that state of things, and that the Crown thenceforward acquired such properties with an extinction of all feudal rights therein, subject only to a right on the part of the seignior to receive an indemnity,—a right more or less strictly enforceable, but certainly recognised by custom. They also think it is established that up to the time of the Ordinance of *Louis* XIV., in 1667, the amount of that indemnity, when not determinable by legal custom or written law, was in the case of lands held by *roturiers* one-fifth of the price. This is very clearly stated by *Hervé* in a paragraph which applies, not only to the indemnity payable by *gens de main-morte*, but also to the indemnity payable by the Crown. He says: "*Lorsqu'il n'y a aucune règle écrite ou lorsqu'il y a du doute, il faut suivre la jurisprudence qui a fixé l'indemnité à la valeur du tiers des biens nobles et du cinquième de ceux qui sont roturiers, car cette jurisprudence fait le droit commun dans les provinces où il n'y a ni loi ni usage contraire.*" This view of the jurisprudence of *France* does not depend simply upon text writers, such as *Guyot* and others. It is confirmed by the various decisions or *arrêts* that have been cited by the learned Judges, and in particular by the *arrêt* in the case of *la terre de Bohin;* for although the decision in that case was subsequent in date to the Ordinance of *Louis* XIV., it is impossible to impute to the Judges who passed it, that they were not applying the law as it existed at the time when the feudal rights were alleged to have been extinguished.

What then is the effect of the Ordinance of *Louis* XIV. of which so much has been said? It assumed the existing law, and modified that law in so far as the amount of the indemnity was concerned. It prescribed a mode of calculating the indemnity less favourable to the subject, and also extremely complicated in form, in so far as it related to property held *en roture.* The second article of it, which relates to seigniories or fiefs purchased by the Crown, seems to preserve the old custom of calculating the

indemnity at one-fifth of the value or price. Their Lordships here observe that it is by no means necessary to hold that this Ordinance, which was passed four years after the establishment of the Superior Council in *Canada*, and therefore was not introduced *proprio vigore* into *Canada*, and was never afterwards registered in *Canada*, ever became part of the law of *Canada*.

It will subsequently be shewn that the parties acted and dealt with each other upon the footing of the law as it existed before the passing of the Ordinance.

The next question is, was this law so defining the rights of the Crown ever introduced into *Canada?* Their Lordships can see no objection in principle to treating it as so introduced. It was merely part of the law of feudal tenure, which was unquestionably introduced into French *Canada* as the law of real property or part of the law of real property in that colony; and which, after the conquest of *Canada*, when the province had passed under British dominion, continued to be law by virtue of the Imperial Statute known as the *Quebec Act*. If the law relating to the rights of the Crown, which was part of the general law of tenure, was not introduced or continued in *Canada*, it should be shewn affirmatively to have been excepted. What has been principally relied upon as establishing this, is the fifth sub-section of the 66th section of the Consolidated Statute, chapter 41. That portion of the Consolidated Statute does not however relate to the seigniory in question, or to seigniories of that class, but is confined to seigniories belonging to the seminary of *St. Sulpice*. The enactment relied upon is moreover extremely general in its terms. It says, "The said payments by the province shall include the commutation of the tenure of all property now held by the province or the Crown, or by the War Department, as representing the late Ordinance Department in any seigniory belonging to the said seminary, and such communtation shall be held to have been perfected on the 4th day of May, 1859." It speaks of the tenure of all property held by the province or the Crown, or by the War Department. It does not positively assert that the Crown was treated as an ordinary *censitaire* in all seigniories in *Canada* in which it might hold lands, or in the particular seigniory which is in question here.

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Reliance was also placed upon two statutes which relate to the officers of Her Majesty's Ordinance, and to lands purchased by them for the protection of the province with imperial funds. It is possible that lands so purchased and held may have been subject to feudal rights, but their Lordships cannot infer from these particular statutes that the French law was altered upon its introduction into *Canada* so as to affect the general rights of the Crown in *Canada* in the manner supposed, or that it has since been so altered.

It may be convenient to mention here that there is no doubt as to the law which is invoked on the side of the Appellant, namely, that upon an alienation by virtue of which property subject to feudal rights passed into the hands of *gens de main-morte*, in the proper sense of the word, an indemnity estimated also at one fifth of the price became payable by the *gens de main-morte* as a compensation for the probable loss of *lods et ventes*. There was, however, this distinction between the indemnity payable by *gens de main-morte* and the indemnity payable by the Crown, viz., that upon the passing of the property out of the hands of the *gens de main-morte* the right to *lods et ventes* again revived, the feudal rights, so far as they were covered by the indemnity, being merely suspended; whereas in the case of the Crown, according to the authorities to which their Lordships have already referred, they were absolutely and for ever extinguished. The real question, then, between the parties in this case is, whether the feudal rights in question were so extinguished, or only so suspended by the transaction of the 20th of April, 1860.

Their Lordships will now examine the document set out at page 24, and consider which of the contentions of the opposite parties it favours. It is in the form of a bill, presented by the seigniors and followed by a statement of what has been paid by the Government. It may here be remarked that the Provincial Government, as such, was not capable of holding lands, and that all lands acquired by Government for public purposes were required by law to be taken in the name of the Crown. The Bill is headed "*Le Gouvernement Provincial.*" Those words clearly import that the bill was presented to the Provincial Government as representing the Crown. It proceeds thus, "*Pour lods et ventes*

sur son acquisition,"—that is, the acquisition by the Government, the representative of the Crown, from the heirs and representatives of *William Hallowell*,—"by two contracts of the 8th of October, 1839, which passed to *Robertson* and *Montizambert*, purchasers for the advantage of the Commissioners of the lunatic asylum." It claims first the *lods et ventes*, alleged to have been payable on that particular transaction, and then contains this item: "*Pour droit d'indemnité sur le susdit prix de vente* £192 0*s.* 10*d.*," being one fifth of the price. Then follows a claim from the Government of the *rente foncière*, which was reserved by the original deed to *Hallowell* in favour of the seigniors over and above their seigniorial dues for fifteen years, a claim which implies that at least during that period Government representing the Crown had been the proprietors of the land. How then did the Government, as appears by the second part of this document deal with these claims. It rejected that for the *lods et ventes* upon the transaction of 1839, and it may well be presumed that the claim was so rejected because it had been established by judicial decisions in *Canada* that *lods et ventes* were not payable on a purchase for a purpose of public utility. It paid to the Appellants the sum of £217 11*s.* 9*d.*, which was composed of the following items, viz.; first, the indemnity claimed £192 0*s.* 10*d.*, less one tenth which was deducted on the ground that these particular seigniors were not entitled to the profits of *la haute justice*, and therefore that one tenth was retainable to cover the claims of those that were so entitled; and, secondly, the sums claimed for the arrears of the *rente foncière*.

An argument was founded by the learned counsel for the Respondent upon the words "*droit d'indemnité*," and upon the fact that the payment was made of the "*indemnité réclamée*." It was contended that the words "*droit d'indemnité*" have received a statutory interpretation, and must be taken to import the indemnity payable to a corporation or other *main-morte*. Their Lordships are of opinion that the words mean only a right of indemnity, and are to be construed *secundum subjectam materiam*. Here it appears on the face of the bill, as already shewn, that the claim was against the Government as representing the Crown; that its title was referred to the transactions of 1839; and that it was treated as

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having been in possession of the property, and liable for the rent reserved for at least fifteen years before the date of the transaction. All this appears to their Lordships to afford the strongest inference that the indemnity claimed was that payable by the Crown.

It was suggested, however, in an early part of the argument that the sum was not that which would have been the amount of the indemnity payable by the Crown under the Ordinance of *Louis* XIV., but, as their Lordships have already observed, that only shews that that Ordinance was not treated as regulating in *Canada* the amount of the indemnity; but that the claim was made according to the law as it existed in *France* before that Ordinance. On the other hand the view which the Appellants take of the transaction is not altogether consistent with the document. There is on the face of the account no allegation that the sum claimed was the indemnity payable by *gens de main-morte* in the proper sense of the term. To treat the Crown as falling within that category would clearly have been an error in law, and the facts stated in the bill which give a partial history of the former transactions, fail to shew that at any time the property was held by any corporation or body of persons who were capable of being treated in the proper sense of the term as *gens de main-morte.* Therefore it appears to their Lordships that upon the true construction of this document it must be held that the indemnity was claimed and paid as an indemnity payable by the Crown, with the legal incidents of a purchase by the Crown, and the payment of an indemnity thereon, namely, that the feudal rights were thereby extinguished and became incapable of being revived.

The chief argument, not already dealt with, which has been used against this construction was founded upon the expression in the deed of 1861, which conveyed the legal estate to the Crown. Their Lordships are not prepared to say that a plausible argument cannot be raised upon that point. That deed, however, cannot be used in the way of admission or estoppel as regards this question, because the Appellants were no parties to it; and it seems to their Lordships that a sufficient explanation of the difficulty is that given by the learned Chief Justice of the Court of Queen's Bench, which is to the effect that the clause was put in for the protection

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in the ordinary way of the conveying party, and to relieve him from any claim which might possibly be made against him in respect of seigniorial rights. Their Lordships cannot set any inference which arises from those clauses against what upon a full view of the law and the facts they think was the effect of the transaction of April, 1860. It seems to them that their view of that transaction really disposes of the case, and that it is unnecessary to deal with any other questions that might be raised upon the construction of the statute and the effect of the conveyance to the Crown of 1861, or any of the other points which have been more or less raised in the course of the argument before them. It will be their duty on the whole case humbly to advise Her Majesty to affirm the judgment of the Court of Queen's Bench for *Lower Canada,* and to dismiss this appeal with costs.

Solicitors for Appellants: *Ingle, Cooper, & Holmes.*
Solicitors for Respondent: *Wilde, Berger, Moore, & Wilde.*

[HOUSE OF LORDS.]

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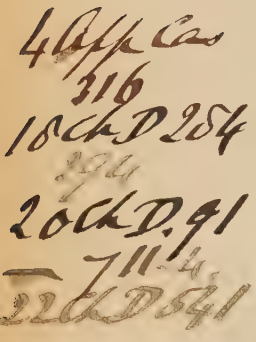
W. J. ROSSITER, GEORGE CURTIS, AND OTHERS . . . . . } APPELLANTS;

AND

DANIEL MILLER . . . . . RESPONDENT.

Contract—Statute of Frauds—Specific Performance.



Several persons interested in a particular piece of land, authorized, by agreement among themselves, one of their number, *W.*, to dispose of it. The land was divided into lots and a plan of the lots made, and certain conditions, on which the land might be let or sold, were printed on the plan. *M.*, an intending purchaser, made inquiries of *W.* as to the sale of certain lots. *W.* expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. *M.* offered to purchase these lots at a price which he named. *W.* promised to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to *M.* that he had done so, and (stating the conditions,) that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. *W.* added that he had instructed the solicitors to forward to *M.* the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. *M.* wrote back, in answer, that he could not be bound to build at any given time, or at all, that the subject had better be reconsidered, unless *W.* was prepared to leave him to do as he might think best. *W.* replied that the acceptance of the offer was without condition, and that *M.* was free to do what he might think best. *M.* afterwards declined to complete the purchase:—

Held, that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that the reference to it in *W.*'s letter did not suspend or in any way affect the contract; and that *M.* was bound specifically to perform his contract of purchase:

Held, also, that the dealings between the parties sufficiently shewed the authority of *W.* to enter into the contract; and, farther, that the description of "the proprietors" for whom he acted was sufficient.

THIS was an appeal against an order of the Court of Appeal which had reversed a previous decision of the Master of the Rolls (1).

(1) 5 Ch. D. 648.

Rossiter and *Curtis* were, with six other persons, proprietors of some plots of land near *Dorking*, in *Surrey*. There was an agreement between these eight persons by which *Rossiter* and *Curtis* were to act as trustees for themselves and the rest in the sale of the land, but the trust was not to appear on the face of any conveyance. In pursuance of this agreement the land was in due form conveyed to *Rossiter* and *Curtis*. Mr. *White* (who was also one of the eight persons interested) was a land agent, and acted as such in the disposal of the land. In July, 1871, the land was laid out in lots, and a plan was prepared shewing the lots. Eight conditions were printed on this plan (1). The first condition set forth the price of each lot. A conveyance, exclusive of stamp duties, was to be furnished, with a title commencing from the 30th of October, 1797, for the sum of £2 2*s*. for each plot, and each purchaser could employ his own solicitor, paying only the £2 2*s*. for the abstract of title. The second related to the dimensions of the property; the third to the lines on which the fronts of any intended houses might be placed; the fourth to fences; the fifth described the sort of buildings that might be erected; the sixth prohibited burning bricks on the land; the seventh related to roads and bridges; and the eighth was in these words: "Each purchaser, on completing his purchase, to execute a deed of covenant embodying the above rules and stipulations, and providing for their due performance, mutually, by such purchaser and the vendors." The applications were to be made to Messrs. *White & Sons*, estate agents, *Dorking*, or to Messrs. *Hart & Marten*, solicitors there. Then came the following: "Each purchaser will be required to sign a contract embodying the foregoing conditions and providing for the payment of a deposit at the rate of 10 per cent on the amount of the purchase-money, and for the completion of the purchase at the expiration of, not exceeding, two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided for by the first stipulation."

In April, 1875, *Miller* called on *White* and verbally offered to purchase some of the lots for £1000, and was then informed that he must purchase under the conditions printed on the plan, and

(1) The conditions are set out in full in the report of the case in the Court below.

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White promised to lay his offer before the "proprietors." Their names were not mentioned. He did so: the offer was accepted at a meeting on the 21st of April, and on that day *White* wrote to *Miller* the following letter: "The proprietors have this day agreed to accept your offer of Saturday last, conveyed to them through me, viz., to purchase for £1000, plots 33, 34, and 35 on the original estate plan, dated July, 1871, and lot 1 in the sale particulars of August, 1873, subject to the conditions and stipulations printed on the plan first named. It was taken into consideration by them, in reducing the published price, that you intended building at once, which of course they wish to encourage. I have requested Messrs. *Hart & Marten* to forward you the agreement for purchase. Will you please elect whether to take the title, or employ your own solicitor?"

On the 22nd of April the Defendant wrote this answer: "I am in receipt of yours of yesterday's date, in which you say, 'It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage.' I cannot be bound to build at any given time, or at all; therefore, as you say the reduction in price was in consequence of your understanding that I should build at once, the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I may think best."

On the same day *White* replied, "Mine to you of yesterday's date was not intended to convey a conditional acceptance of your offer therein defined. I gathered from your remarks that you intended to build shortly, but it is not the wish of the proprietors or myself to bind you in any way to do so. In developing an estate like this, every house that is built increases the value of the remaining land. This I laid before the proprietors. Your offer I take to be based simply on the stipulations of July, 1871, so that, in your own words, 'you are at liberty to do as you may think best.'"

Shortly afterwards the Defendant informed *White* that he should not employ a separate solicitor. On the 30th of April Messrs. *Hart & Marten*, the solicitors of the owners, sent the Defendant a formal agreement with a letter, asking him to return it signed, with a cheque for £100 deposit. On the 3rd of May the

Defendant returned the agreement unsigned, with a letter declining to do anything more as to the purchase of the land, but offering to pay any reasonable charges for the trouble incurred.

After some correspondence, in which Messrs. *Hart* insisted that *Miller* had entered into a valid contract for the purchase of the land, proceedings were taken to enforce performance of the agreement. *Miller* put in a demurrer on the ground that it did not appear by the statement of claim that the alleged agreement or any note or memorandum thereof was ever signed by him or by any person authorized on his behalf. The case was tried before the Master of the Rolls, who gave judgment for the Plaintiffs. On appeal the Lords Justices reversed his decision, thinking that no sufficient contract had been executed. This appeal was then brought.

Mr. *Davey*, Q.C., and Mr. *Carson*, for the Appellants:—

There was a complete contract constituted here. The conditions printed on the plan were those to which a purchaser was required to agree. They were fully communicated to Mr. *Miller* by Mr. *White* when the offer to purchase was made. No objection was then or afterwards made to these conditions. The acceptance of the offer here in no way whatever varied the terms of the conditions printed on the plan. The mention, in the 8th condition, of executing "a deed of covenant embodying the above rules and stipulations," did not prevent a complete contract from being constituted, even though such a formal deed should not be executed. It is settled law that if, in the correspondence between the parties, a clear contract can be found, the execution of a formal instrument declaring that contract, which instrument could then only repeat the terms agreed on in the correspondence, is not necessary. Here the letters did fully constitute a contract, and were signed by the parties entitled to make it.

But then it is said that there is nothing to shew that Mr. *White* was the agent of the vendors, authorized to make the contract. The affidavits in the case leave no doubt upon that point.

As to the other point, that the persons designated as the "proprietors" ought to have been named, it is clear that naming them is not a legal requisite in a case like this, where the person who is

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their agent (and here he happened to be one of the body of persons really interested) acts on their part and with their assent—and, until it is sought to get rid of the contract, never has his authority questioned.

Peek v. *The North Staffordshire Railway Company* (1), *Smith* v. *Webster* (2), *Honyman* v. *Marryatt* (3), *Fowle* v. *Freeman* (4), *Kennedy* v. *Lee* (5), *Thomas* v. *Dering* (6), *Glengall* v. *Barnard* (7), *Skinner* v. *M'Douall* (8), *Crossley* v. *Maycock* (9), *Ridgway* v. *Wharton* (10), *Bonnewell* v. *Jenkins* (11), *Benjamin* on Contracts (12), *Hood* v. *Barrington* (13), *Sale* v. *Lambert* (14), *Potter* v. *Duffield* (15), *Commins* v. *Scott* (16), *Beer* v. *London and Paris Hotel Company* (17), *Catling* v. *King* (18), *Brogden* v. *The Metropolitan Railway Company* (19), *Meynell* v. *Surtees* (20), *Marvin* v. *Wallis* (21), and *Chinnock* v. *The Marchioness of Ely* (22), were cited and commented on.

Mr. *Chitty*, Q.C., and Mr. *Phear*, for the Respondent:—

There was no perfect contract entered into in this case. No deed of covenant was ever executed—none was ever drawn up and presented to the Respondent for execution. Yet the 8th article of the conditions expressly required such a deed to be executed, "embodying the rules and stipulations, and providing for that due performance mutually by the purchaser and the vendors." Without that deed, any correspondence that took place between the parties was mere treaty and negotiation. And another portion of the same 8th condition even more peremptorily required this to be done, for the words were, "Each purchaser will be

(1) 10 H. L. C. 473.
(2) 3 Ch. D. 49.
(3) 6 H. L. C. 112.
(4) 9 Ves. 351.
(5) 3 Mer. 441.
(6) 1 Keen, 729.
(7) 1 Keen, 769; *nom. Glengall* v. *Thynne*, 2 H. L. C. 131.
(8) 2 De G. & Sm. 265; 17 L. J. (Ch.) 347.
(9) Law Rep. 18 Eq. 189.
(10) 6 H. L. C. 238.
(11) 8 Ch. D. 70.
(12) Page 164.
(13) Law Rep. 6 Eq. 218.
(14) Law Rep. 18 Eq. 1.
(15) Ibid. 4.
(16) Law Rep. 20 Eq. 11.
(17) Ibid. 412.
(18) 5 Ch. D. 660.
(19) 2 App. Cas. 666.
(20) 3 Sm. & Giff. 101; 25 L. J. (Ch.) 257.
(21) 6 El. & Bl. 726.
(22) 4 De G. J. & S. 668.

required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit," &c. In such a case as this, it was impossible to say that these absolute requirements for executing a formal contract were to be superseded by a correspondence by letter, in which one party referred to what had been verbally proposed, and the other did not object to his statements. But here, in fact, an objection was made, for the letter of the 21st of April written by Mr. *White*, did introduce a new stipulation, one which had never been mentioned in the printed conditions, and which new stipulation was instantly rejected by the Respondent. The introduction of that new stipulation and its rejection, threw open the whole negotiation, and after that, nothing could satisfy the conditions marked on the plan short of the execution of that formal contract and covenant which those conditions required. All the cases where there were ordinary negotiations commenced and carried on between the parties by mere letters, were quite inapplicable here, for here the negotiations themselves began by a distinct reference to the conditions printed on the plan, and no arrangement between the parties could be valid without a complete observance of the terms of those conditions.

The cases referred to on the other side were discussed, and *Chinnock* v. *The Marchioness of Ely* (1) was especially relied on, and in addition *Winn* v. *Bull* (2), *Skelton* v. *Cole* (3), and *Thomas* v. *Brown* (4), were cited.

There was here no sufficient proof of the authority of *White*. And then, too, the description of "proprietors" was not a sufficient description of the persons with whom the supposed contract was said to be made.

Mr. *Davey* replied.

THE LORD CHANCELLOR (Lord *Cairns*) :—

My Lords, after a careful and anxious consideration of this case, I regret to say that I am not able to look at it in the point of view in which it has presented itself to the learned Judges of the Court of Appeal.

My Lords, the appeal arises in an action for specific performance,

(1) 4 De G. J. & S. 638. (3) 1 De G. & J. 287.
(2) 7 Ch. D. 29. (4) 1 Q. B. D. 714.

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brought by the vendors of certain property against the purchaser; and in that action three questions have been raised, one, which I will call the principal question, and two others, which are to some extent subordinate. The principal one, the main question in the case, is, whether there was in point of fact a concluded contract between the parties; and the two subordinate questions are, whether in the view of the enactment of the *Statute of Frauds*, the vendors were sufficiently described in writing by the term "proprietors"; and secondly, whether the person who affected to act as agent for the vendors had authority to bind them. My Lords, those being the three questions which have been raised, it was upon the first of them that the case was determined by the Court of Appeal. Their Lordships, all of them, as I understand, thought that there was no contract actually concluded in the case. Lord Justice *James* said, that in his opinion it was not a question of the *Statute of Frauds*, but a question of whether there was any contract; and Lord *Coleridge* and Lord Justice *Baggallay* both founded their decisions upon a case decided by the late Lord *Westbury*, the case of *Chinnock* v. *The Marchioness of Ely* (1), the decision in which was that there was no contract. Therefore I understand that, as I have said, all the learned Judges in the Court of Appeal proceeded on the principle that in the present case no contract had been actually concluded.

Now, my Lords, in order to consider that first question, I will remind your Lordships that there was here a certain property in the county of *Surrey* which had been bought by some persons, eight in number, upon a speculation with the view of re-selling it, and they had the property conveyed to two of their number, entering at the same time, or just before, into an agreement amongst themselves as to the manner in which the speculation should be conducted. The property was to be vested as regards the legal estate in two of the number, but there was to be no notice of the trust put upon the title. The two were to have, upon the title, the power of leasing and of selling, but, as between them and the other proprietors, they were not to lease or sell without the sanction of their co-proprietors, and that sanction was to be given by the majority, and meetings were to be held, five of

(1) 4 D. J. & S. 638. 11 Jur. N.S. 329

the number constituting a meeting, and the questions being decided by the majority of the meeting.

My Lords, they then took a course which is not unusual in such cases. As the object was to sell in lots of considerable size, they had a map of the property prepared for circulation, and they had printed upon the map certain terms and conditions upon which the sales were to be made. I must call your Lordships' attention particularly to the nature of those terms. They commenced in this way: "The following are the conditions of sale"; that is the introduction to the statement of them. "The *Holloway* Estate, *Dorking*, is situated about half a mile south of the town, and about one mile from its railway stations on the *South Eastern* and *South Coast* lines." Then it speaks of the site, of the supply of water, and of the drainage. It speaks then of the roads, and it uses there the term "proprietors" to denote the owners of the property who are offering it for sale. The first head of the conditions is as to the price of the plots, and that states, "The price of each plot, including the timber growing thereon, is marked on the map. The proprietors will furnish a conveyance, exclusive of stamp duties, with a title commencing from October 30th, 1797, for the sum of £2 2*s.* for each plot; this to include the lithographed abstract, the deed of covenant embodied in the conveyance, and the contract hereinafter mentioned; but should two or more pieces be purchased by one person, they shall for this purpose be considered as one plot. Should any purchaser prefer employing his own solicitor, he can do so at his own expense, paying the vendor's solicitor the sum of £2 2*s.* for the abstract of title": a stipulation which is unusually detailed with regard to the title and the expense which a purchaser would incur in obtaining the title which was offered to him.

Then there is a second head as to the dimensions of the plots, a third as to building lines, and where fences are to be erected, a fourth as to fences, a fifth as to the value of buildings to be put upon the plots, a sixth as to forbidding brick-making, a seventh reserving certain rights as to the control of the roads and the drainage, and then an eighth in which again there is a return to the question of title and conveyance: "Deed of Covenant"; "Each purchaser, on completing his purchase, to execute a deed of

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covenant embodying the above rules and stipulations, and providing for their due performance mutually by such purchaser and the vendors. Applications to purchase to be made on and after the 26th day of August next, to Messrs. *White & Sons*, estate agents, *Dorking*, or to Messrs. *Hart, Hart, & Marten*, solicitors, *Dorking*." Then, "In the event of more than one application being made during the first day's sale," it provides who should be the purchaser, and then it concludes with this sentence: "Each purchaser will be required to sign a contract embodying the foregoing conditions, and providing for the payment of a deposit at the rate of £10 per cent. on the amount of the purchase-money, and for the completion of the purchase at the expiration of not exceeding two months from the date of the contract. The costs of such contract will be included in the fixed charge for the conveyance provided by the first stipulation."

I pause there for the purpose of pointing out to your Lordships that in these conditions there are to be found the terms—and the detailed terms—of a contract, such as might reasonably be expected to be proposed with regard to sales of plots of land of this description. There is no doubt a stipulation that the purchaser would be required to sign a contract embodying these conditions. That is an obvious and natural term, because the contemplation is that persons will come in and will make offers of the price which is required for the plots, and at that point the persons so offering will not be bound by anything; it will be necessary to bind them, and therefore they are told, beforehand, that at the time when their offer is accepted, or along with the acceptance of it, the matter will not be allowed to rest *in dubio*, or without legal obligation, but that they will be required to sign something which will bind them. But they are also told what they will be required to sign; it will not be a contract at the arbitrium of the vendors, not a contract the terms of which they do not know, not a contract the provisions of which they will see for the first time when it is offered to them to sign, but a contract as to which the vendors are content, beforehand, to bind and oblige themselves that it will assume the shape of these stipulations, and no other shape. That is what is stated to the purchasers by this printed form of conditions.

That being the scheme by which this property was offered to

the public, I have only to say that it appears that some sales were made in the year 1871 as to which no question arises, and some more in the year 1873, but in the year 1875 there was still some part of the property unsold. It was in that year that the present Respondent made an offer, to which I am about to refer, for one or more of the plots of the unsold land. The manner in which the offer was made is detailed in an affidavit, and there appears to be no controversy as to that part of the case. Mr. *White*, who I may say here was acting as the agent of the vendors—not their agent with plenipotentiary powers, but their agent as a surveyor for the purpose of receiving offers and communicating with intending purchasers—says in his affidavit: "In the month of March, 1875, the Defendant" (that is the Respondent) "personally made an application to me at my office at *Dorking* with regard to purchasing part of the said estate, and on the 16th of the said month he was furnished with a copy of the aforesaid plan of July, 1871" (that is the map with conditions to which I have referred). "On or about the 17th day of April, 1875, the Defendant, accompanied by his daughter and his son-in-law, Mr. *Roslyn*, called upon me at my said office in *Dorking*, and then and there verbally offered to purchase the said plots numbered 33, 34, and 35 on the aforesaid plan of July, 1871, and also the Lot No. 1 on the said plan of August, 1873, at the price of £1000. I pointed out to the Defendant, at the same time and place, that he must purchase subject to the conditions and stipulations printed on the said plan of July, 1871, a copy of which had been furnished to him as aforesaid, and I promised him to lay his offer before the said proprietors. To the best of my recollection and belief, the offer was made in the following words:—the Defendant, addressing his said son-in-law, said, 'Shall I make Mr. *White* an offer at once or write?' and on Mr. *Roslyn* replying, 'Make it at once,' he accordingly did so." That, of course, was a verbal offer, which would not become binding upon him until some writing had passed, but it was an offer as to the terms of which there is, I believe, no controversy. It was an offer which, after the statement of Mr. *White* as to the way in which it was made, must be taken to be an offer of £1000 for these particular plots on the terms and conditions in the printed paper of July, 1871.

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That offer having been made Mr. *White* submitted it to a meeting of the persons beneficially interested (I will refer presently to the fact as to who were present) and having received the authority of that meeting to accept the offer, he wrote a letter to the Respondent on the 21st of April, 1875, in these words: "*Holloway Farm* Estate.—Dear Sir,—The proprietors have this day agreed to accept your offer of Saturday last conveyed to them through me, viz.:"—and then he rehearses the offer—"to purchase for £1000 plots 33, 34, and 35 on the original estate plan, dated July, 1871, and Lot 1 in the sale particular of August, 1873, subject to the conditions and stipulations printed on the plan first named. It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage. I have requested Messrs. *Hart* and *Marten* to forward you the agreement for purchase. Will you please elect whether to take the title or to employ your own solicitor. I may add that the water company will lay on their main as soon as you require their water for building purposes." I will put aside for the moment the mention here that it had been taken into consideration by the proprietors in reducing the published price, that Mr. *Miller* intended building. That introduced an element which became the subject of another letter. Putting that aside, your Lordships have here a rehearsal or repetition by the writer, Mr. *White*, of the terms, stating the price, stating the property to be purchased, and stating that the purchase was made subject to the conditions and stipulations printed upon the plan of July, 1871. My Lords, taking that in connection with that plan it is, so far as this letter is concerned, an acceptance by the vendors, and if Mr. *White* was their authorized agent, then an acceptance by their authorized agent, in writing, of an offer clear and distinct, upon the terms of that paper; and, so far as the vendors were concerned, I am at a loss to conceive any words which could more clearly or distinctly have expressed the form of agreement by which they were content to be bound.

Mr. *White* adds this: "I have requested Messrs. *Hart & Marten* to forward you the agreement for purchase." My Lords, what did that mean? At the time this letter was written it was an absolute necessity that something should be signed by Mr. *Miller*, for up

to that time he had signed nothing; he had made no offer in writing, and he was not in any way bound. It therefore was not only natural for Mr. *White*, but it was the duty of Mr. *White* in accepting the offer and recording the acceptance of the vendors in writing, to take immediate steps to obtain a correlative acceptance in writing by the purchaser. The natural way in which he would obtain that acceptance would be by calling on the purchaser to sign that agreement which he was told in those conditions of sale he would be asked to sign, and accordingly Mr. *White* says so in his letter. It is not in any way a suspending of the making of a contract until an agreement is determined upon and is arranged. It is a letter recording the conclusion of a contract so far as the vendors are concerned, which letter at the same time takes notice that the purchaser is not yet bound by the signature required under the *Statute of Frauds;* and he is therefore called upon to place himself under the obligation under which the vendors already were content to lie.

Accordingly, my Lords, that was accompanied with a contemporaneous letter to the solicitor of the vendors which I only refer to as part of the history. It could not of course in any way bind the purchaser, "Will you please prepare and forward to *Daniel Miller*, Esq., 1, *Avenue Villa, St. Peter's Road, Croydon*, the contract for purchase as this day agreed by the proprietors. I have written Mr. *Miller* stating that you will do so and accepting his offer."

Now Mr. *Miller* replied to the letter I have read; and here I wish to remind your Lordships of the course which the transaction might have taken. It might have been the case that Mr. *Miller* did not make any answer by letter; if so, the matter would have rested upon this letter written by the vendors, and, until the solicitor came to Mr. *Miller* with the agreement, Mr. *Miller* would have signed nothing and would not have been bound. But without waiting for the agreement, Mr. *Miller* wrote the letter which I am going to read. He said: "I am in receipt of yours of yesterday's date, in which you say 'It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage.' I cannot be bound to build at any given time, or at all. Therefore, as you

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say the reduction in price was in consequence of your understanding that I should build at once, the offer had better be reconsidered, unless you are prepared to leave me at liberty to do as I may think best."

What, my Lords, is the meaning of that letter? It is of course to be read in juxta-position to, and in continuation of, the letter to which it is an answer. He speaks of his offer as Mr. *White* had in the letter written to him spoken of it. The writers of the first letter and of the second are therefore at one as to what the offer was, as to the property to be sold, the price, the terms, and conditions. Mr. *Miller* therefore puts his signature to a letter in which he affirms his assent to the description of the offer which he had found in the letter addressed to him. But then, in consequence of the sentence in the letter addressed to himself, which had implied that the vendors expected him to build at a particular time, although they of course had no right absolutely to call for that building, he very properly, in order to avoid any misunderstanding, states that he would not come under any terms of that kind, and therefore he says "the offer had better be reconsidered unless you are prepared to leave me at liberty to do as I may think best." My Lords, I apprehend that to mean my offer is still before you; you have described my offer correctly in your letter; I repeat it; but let there be no misunderstanding with regard to the question of building immediately; that is not included in my offer, so I ask you again to consider it; but, supposing that is rightly understood, and my offer is accepted pure and simple, I am content that it should be so. My Lords, it therefore comes at this point of the case to a distinct and clear offer made, and made by a person who has confirmed it in writing, and the only question is, was that letter accepted?

On the 22nd of April Mr. *White* replies: "Mine to you of yesterday's date was not intended to convey a *conditional* acceptance of your offer therein defined. I gathered from your remarks that you intended to build shortly, but it is not the wish of the proprietors or myself to bind you in any way to do so. In developing an estate like this, every house that is built increases the value of the remaining land—this I laid before the proprietors. Your offer I take to be based simply on the stipulation of July,

1871, so that in our own words 'You are at liberty to do as you may think best.'"

My Lords, I have only to say that—but that I have found the learned Judges in the Court of Appeal, for whose opinion I have the greatest respect, taking a different view—I should have said that a clearer and simpler case of an offer made and accepted by a correspondence consisting of no more than three letters I have seldom seen. Every term is made clear, by reference to an elaborate scheme of conditions under which the sales were to be made. The offer is recognised in terms by the person who had made it, under his hand, and it is accepted without the possibility of doubt or cavil by the persons to whom the offer was made.

My Lords, the reference to the agreement in the first letter is, I think, exactly what you might have expected to find. I have pointed out that at that time the purchaser was in no way bound, and therefore it was right in the vendors to call upon him for the signature of the agreement which he was bound to sign. But, as regards any legal consequence, the moment he himself had written a letter in which he had referred to the contract as a contract under the terms and conditions of the articles of 1871, the vendors might, if they had so desired it, have required the agreement to be prepared and signed as a matter of form, but as a matter of law it was to my mind perfectly indifferent whether they did so or not. If they did so, if an agreement had to be prepared and signed, it must be an agreement exactly to the effect of the terms and conditions of the paper of 1871, and no other terms and conditions could have been introduced. If other terms and conditions had been introduced, either party would have had a perfect right not only to refuse to accept those other terms, but to insist upon an agreement in the original terms of the paper of 1871.

My Lords, I therefore come to the conclusion that there is here clearly and distinctly a concluded contract with the terms expressed in this letter, subject to the observation I have yet to make upon what I call the second part of the case in reference to the use of the word "authorized."

Let me, my Lords, here say that I am at a loss to understand upon what principle the case of *Chinnock* v. *The Marchioness of Ely* (1)

(1) 4 De G. J. & S. 638.

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was supposed to bear upon the present case. In that case there was a house agent, who was authorized to find a purchaser for a house belonging to Lady *Ely*. He was warned that he was not to put his hand to any paper upon the subject, because the conditions as to title under which the house required to be sold were such that they must be prepared by a solicitor with great care. The house agent scrupulously adhered to these instructions; he got an offer for the house at a particular price, but he refused to put his name to any acceptance of it. There were no terms and conditions mentioned, but merely an offer of the price of £10,000. Then the negotiation, for some reason or other, fell into abeyance, and remained so for some time. Afterwards it was taken up again, and taken up by the solicitor, not by the house agent. At the time it fell into abeyance there is not the slightest doubt that there was nothing which in any way amounted to a contract; there neither was a concluded contract, nor a note in writing of a concluded contract. When the solicitor came in he wrote the letter upon which the whole case turns, and that letter was this: "We have been instructed by the Marchioness of *Ely* to proceed with the sale to you of these premises. The draft contract is being prepared, and will be forwarded to you in a few days." My Lords, the construction put upon that by the Lord Chancellor was that it amounted to no more than the solicitors saying that they took up the matter where it had stopped, and it had stopped at a point where there was no contract, and that they took it up, therefore, saying that they would continue the negotiation in order that a contract might be prepared to which both parties might agree. And then Lord *Westbury* uses these words (1), "I entirely accept the doctrine contended for by the Plaintiff's counsel, and for which they cited the cases of *Fowle* v. *Freeman* (2), *Kennedy* v. *Lee* (3), and *Thomas* v. *Dering* (4), which establish that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a

(1) 4 De G. J. & S. at p. 645.
(2) 9 Ves. 351.
(3) 3 Mer. 441.
(4) 1 Keen, 729.

formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract." Up to that point it appears to me that these words exactly describe the case which your Lordships have before you. But the words which are relied upon by the learned Judges in the Court of Appeal are the words which follow: "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. And this appears to me to be the real state of the case before me, for I am clearly of opinion that the true and fair meaning and legal effect of the letter of the 19th of November may be expressed in these words: 'I will go on with the treaty for the sale to you of my house, and for that purpose will send you the form of the contract which I am willing to enter into.' I take, therefore, the letter of the 19th of November either as a conditional acceptance of the Plaintiff's terms, subject to the draft contract being agreed to, or as an expression of willingness to continue the negotiation, and for that purpose to propose a form of agreement."

My Lords, I can only say that I am willing to accept every word of Lord *Westbury* as there given. I assume that the construction put by him upon the letter I have quoted was a proper construction, and I entirely acquiesce in what he says, that if you find, not an unqualified acceptance of a contract, but an acceptance subject to the condition that an agreement is to be prepared and agreed upon between the parties, and until that condition is fulfilled no contract is to arise, then undoubtedly you cannot, upon a correspondence of that kind, find a concluded contract. But, I repeat, it appears to me that in the present case there is nothing of that kind; there is a clear offer and a clear acceptance. There is no condition whatever suspending the operation of that acceptance until a contract of a more formal kind has been made.

My Lords, it is a satisfaction to think that before the judgment of the parties in this case became somewhat obscured by the con-

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troversy which arose between them, the view which I certainly must take of the case was the view which, as it appears to me, was taken both by the Respondent himself and by his legal advisers. With regard to the Respondent himself, I am at a loss to conceive how the offer which he made of the payment of expenses incurred could have arisen unless he had felt in his own mind that, whether he had a right to resile by reason of some technicality connected with the *Statute of Frauds* or no, still that as between man and man a contract had been concluded between him and the vendors. And with regard to his solicitors, we find them after some time, and after, as it appears, they had for the first time been made aware of the contents of the conditions, which were printed on the paper of July, 1871, stating that they would advise their client in this way. On the 16th of June they say: "On considering the effect of the conditions printed on the plan of 1871, we shall advise Mr. *Miller* that what has occurred creates, as you maintain, a contract mutually binding on the basis of those conditions. Please to send us accordingly an abstract of the vendor's title, commencing from the 30th October, 1797." Then lower down, "We shall be happy to pay you the £2 2*s.*, as presented by the printed conditions. The terms of the contract sent for Mr. *Miller's* signature may or may not be reasonable to be required where no contract already existed, but are certainly unreasonable where a contract existed entitling him to better terms." My Lords, that of course did not bind the Respondent, but it was a just view, as it seems to me, of the law; and I greatly regret that the advice of his solicitors was not taken by him.

My Lords, the other two points in the case really are very small. As to the use of the term "proprietors" I own I was somewhat surprised to hear that question argued, for I am sure your Lordships have frequently seen conditions of sale not merely by auction but by private contract, in which it is stated that the sale is made, sometimes by the owners, and sometimes by the mortgagees, and a form of contract is annexed in which an agent signs for the vendors, and no other specification upon the vendor's part is inserted, and I never heard up to this time that a contract under those circumstances was invalid. In point of fact, my Lords, the question is, is there that certainty which is described

in the legal maxim *id certum est quod certum reddi potest.* If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the *Statute of Frauds.* But if I, being really an agent, enter into a contract to sell *Blackacre,* of which I am not proprietor, or to sell the house No. 1, *Portland Place,* on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the *Statute of Frauds* can arise; and I should be surprised if any authority could be found, and certainly none has been produced, to say that a contract under those circumstances would not be valid.

My Lords, as to the other question, the question of authority. As a matter of pleading the authority of the agent for the vendors which he professed to have, and averred that he had, is not denied, is not traversed. Your Lordships were asked if there was a difficulty upon that point to take steps which would admit of an amendment being made. My Lords, I certainly do not think there could be a case in which less indulgence at any stage ought to have been given to the Respondent than on this point, with regard to amendment, because, during the whole of the controversy from the month of April, 1875, and thenceforward for a number of months, the idea never was suggested between the parties that there was any want of authority on the part of Mr. *White.* Every possible objection that could be taken was taken, but that objection never was taken. My Lords, it is an objection which, even if it had been pleaded, seems to me perfectly baseless. The speculation with regard to this property I have already described to your Lordships. There was a meeting of the proprietors at which the proposal of the Respondent was considered. There were present at that meeting five of the number including the two in whose names the legal estate was vested. There was, therefore, a majority at a meeting duly summoned, such as the terms of the agreement for the speculation required. It was by meetings of that kind that the whole business of the speculation was arranged and conducted, and there is not the slightest ground,

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as it seems to me, for saying that the business of the speculation was not conducted in a way completely to bind every member of it. It seems to me that Mr. *White* had undoubtedly the authority of the proprietors, and who the proprietors were, there could, as I have observed, be no possible doubt.

I therefore move your Lordships that, as I have already said, the order appealed from be reversed, and that the decree made by the Master of the Rolls be restored, and that the Respondent pay to the Appellants their costs both in the Court of Appeal and in your Lordships' House.

LORD HATHERLEY :—

My Lords, I quite concur in the view which has been taken of this case by my noble and learned friend on the woolsack, and I shall feel it my duty to add very little to the exhaustive statement he has made both of the facts and of the law of this particular case.

I at once say, that I shall pass over altogether the question with regard to the word "proprietors," upon which I have not the least hesitation in coming to the same conclusion as that which has been already mentioned, and which was the view of the Master of the Rolls and the Judges of the Court of Appeal; there was one unanimous opinion upon that subject.

Upon the other question, as to whether or not the authority of Mr. *White* was good, I think it was justly stated by my noble and learned friend on the woolsack that there can be no doubt upon that subject, when you consider the meetings of the proprietors that were held ratifying and sanctioning what had been done in their name, just as much as if they had given a previous sanction. It is not possible to say (as was urged by Mr. *Chitty*, on this part of the case) that there had been any breaking off, because it appears that there was no breaking off at all from the engagement which he represents as a treaty, not as an engagement till after it was ratified by the other party. The truth is, I hold that the treaty never was broken off from the first moment that it was entered into. It is not necessary farther to go into the question of authority.

Now, my Lords, as regards the main question of the agreement

itself, I certainly should very much regret, in the case of any contract which appears to me so plainly expressed as this is, to break into a uniform line of decisions whether it may, or may not, have been approved of by all the Judges before whom the question has come. The decisions of different Judges have strengthened the law, because Judge after Judge having expressed his approval of the law, certainly you might expect that he would do what he could to put that law in a correct position, and would hold persons very strictly to the agreements into which they had entered. Without attempting to do more than that, he only confirms and strengthens a course of decision which has become too strong to be countervailed now, hardly even by a decision of your Lordships' House. It has been established for far too long a time, and by some precedents in your Lordships' House, that if you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, We will have this agreement put into due form by a solicitor. If it is stated in so many plain and express terms (and in *Chinnock* v. *The Marchioness of Ely* (1) that was the ground on which that case proceeded) that one of the very terms of the agreement itself was that it should not be concluded by the agent employed in the first place to enter into the negotiation, and that it should not be a concluded agreement until a solicitor intervened and drew a formal agreement; if you find that to be a term of the agreement itself, well and good, if not, the agreement stands. Both parties may desire that it shall be put into a formal shape by a solicitor who, in that case, will not be able to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with

(1) 4 De G. J. & S. 638.

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unity of purpose with reference to the sale and purchase by the two parties to the contract.

Now, my Lords, in this particular case, although of course one ought to hesitate a little after the judgment which has been pronounced by the learned Judges in the Court of Appeal, still it does seem to me that Mr. *White* took great pains to make what he was doing extremely clear. He had had a conversation with the Respondent, but he knew very well, and probably the Respondent also knew, that a mere conversation would not do—that there is such a thing as the *Statute of Frauds*, and therefore that if there is to be an agreement, it must be recorded and expressed in writing by the persons sought to be charged with it. Mr. *White* being aware of that, places distinctly in writing before the gentleman with whom he had had the verbal agreement, what his conception of the agreement is, and receives a letter from that gentleman to whom he has so stated the agreement, acknowledging it, as I shall presently shew, to be a correct exposition of the agreement between them. Now it would have been unpardonable if Mr. *White* had made that statement unless he had been fully persuaded, at all events on his own part, that he was making a correct representation of the terms; and it was the duty of the person to whom he made that statement, as soon as ever he received it, to correct whatever he conceived to be an error in it, and I shall shew your Lordships presently that he does correct that which he supposes (erroneously as it turns out) to be an item in the agreement to which he had not assented, namely, that which relates to the building.

Now, the remarks which I have to make on this subject will be very brief indeed. Take Mr. *White's* affidavit:—[His Lordship here repeated the statement from that affidavit as already read by the Lord Chancellor.]

It is very clear that the Respondent made the offer intending that to be the agreement he was about to come to—he was making an offer to purchase for £1000 the property he had been talking about, and to purchase it upon the conditions he had been talking about with Mr. *White*, namely, the terms and conditions of the paper of July, 1871. And when you come to Mr. *White's* letter, which is the foundation of what we have in writing, evidenc-

ing the agreement, you will find that he puts it extremely correctly, thus: He tells you in that affidavit that he promised Mr. *Miller* that he would lay his offer before the proprietors. We find in fact (that is in evidence) that the proprietors do meet soon after, and, there being a quorum, they come to a resolution that the offer be accepted, and thereupon Mr. *White* writes this letter to the Defendant:—[His Lordship read the letter, see *ante*, p. 1126.] That is a statement of the agreement. Then he adds these words as indicating what had taken place at the meeting which confirmed the power of Mr. *White* to accept the offer. "It was taken into consideration by them in reducing the published price that you intended building at once, which of course they wish to encourage. I have requested Messrs. *Hart & Marten* to forward you the agreement for purchase. Will you please elect whether to take the title, or employ your own solicitor."

My Lords, I have already made an observation upon what has been urged with regard to the statement that a solicitor would be directed to prepare a formal agreement. That in no way varies or alters the offer already made, or the agreement if that offer was accepted *simpliciter*. Mr. *Miller* finds, no doubt, that the letter very correctly represents the offer he had made, and although he has made an affidavit on this matter he has not contradicted, in the least, any part of Mr. *White's* statement as to how the verbal agreement which was first made came about. But he very properly, in order that there may be no mistake about the matter, says this:—[His Lordship here read Mr. *Miller's* letter, dated the 22nd of April, see *ante*, p. 1126.] That does really induce me to be bold enough to say that it is as clear an acknowledgment, and affirmance, in writing, of the proposition which had been made verbally, as can well be conceived in any case; for this gentleman is very particular all through; he had evidently studied the statement made to him, and he finds no fault whatever with the statement made by Mr. *White* of what the offer was. He does think it necessary to call attention to the passage in the letter which says, that the proprietors in reducing the price had been encouraged by the notion that Mr. *Miller* was going to build at once upon the premises, and he says, Take care—that was no part of the agreement, I do not agree to that, and I do not intend to agree to it,

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and therefore if that is your intention you had better allow the offer to be at once reconsidered, unless you are prepared to leave me at liberty to do as I may think best. That means, If you allow me to do what I think best I do not want the offer to be reconsidered; there is the offer—you have stated it rightly to me, I made it before and I repeat it now; but I find a new term in your letter, I cannot quite make out whether it is a term which you propose, or whether it is merely a suggestion or hint that you are giving me, but I do not acknowledge it as any part of the agreement whatsoever, and unless you can make up your minds to leave me entire liberty in that matter you had better reconsider the offer. They told him that they did give him entire liberty. Then what more could be said? I do not think it necessary, my Lords, to go farther into detail on the subject of the agreement, and with regard to the case of *Chinnock* v. *The Marchioness of Ely* (1), I think that has no bearing upon the present case. If we did not consider that these parties had entered into an agreement we should grievously break the long established course of authority without any grounds that I can discover in the present case beyond that of a proposal that the agreement should be formally reduced into shape by a solicitor.

My Lords, Lord Justice *James* comments at considerable length upon the difficulty which the proprietors might have been in if it had been the other way—that is to say, Supposing it was Mr. *Miller* who was wishing to enforce this agreement against Mr. *White's* proprietors; in doing that it is said it might be very hard upon the proprietors to find themselves bound down by an onerous condition of sale. But it is perfectly clear that on their part they were intending to do that. There is no doubt whatever, even if there was a doubt as to any other part of the case, that they intended that whoever bought any of their land should buy it upon those conditions of sale, and that both on the part of the proprietors and on the part of the intending purchaser, the purchase should be subject to those conditions. I do not think there ever was any doubt or hesitation in anybody's mind as to that part of the case. The part of the case as to which there was hesitation, was as to whether or not the acceptance was such as to

(1) 4 De G. J. & S. 638.

enable the parties to say that this was a treaty and not an agreement. We are bound to decide between a treaty and an agreement, and the side of agreement must prevail. The treaty was completely exhausted and at an end when Mr. *White* informed the intending purchaser that he had mistaken him if he had supposed that he had introduced an additional term into the agreement with regard to building. Thereupon the agreement which had been made verbally and which had thus been acknowledged in writing by Mr. *Miller*, came fully and completely into existence.

LORD O'HAGAN:—

My Lords, in this case two points have been submitted to your consideration, and on both you have been assisted by very able arguments. The first regards the sufficiency of the contract as a final and binding agreement, and the second its sufficiency, within the operation of the *Statute of Frauds*. As to the agent's authority, I think the matter too plain for argument. Mr. *White* was authorized to act by a majority of the proprietors, and his action was approved and ratified by them all.

On the second point, all the learned Judges in both the Courts below have been of one opinion, in favour of the Appellants, and I have no doubt that that opinion is correct. The parties to a contract in writing must, no doubt, be specified, but it is not necessary that they should be specified by name. The whole course of decision and practice shews that it is not. If they are so indicated, by description or by reference, as to be ascertained, or certainly ascertainable, the exigency of the statute in that respect is satisfied. Here the vendors are called proprietors, and described as proprietors in possession. There could be no mistake as to their ownership of the premises to be conveyed, and their identity, for all practical purposes, was as clearly and unequivocally established as if their names and designations had been set out in the conditions of sale. It is of common experience that transactions continually occur, and have repeatedly been validated by judicial decision, under such circumstances. Business is habitually conducted on the assumption that such a description is legally satisfactory. No inconvenience has arisen, and I concur with Lord Justice *James* that "it would be a very bad thing" if the question which has been so "conveniently settled" should now be opened

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without necessity. Your Lordships will probably affirm, without difficulty, the unanimous decision of the learned Judges on the second point.

On the first point, but for the view adopted by the Judges of Appeal, I should think the case as clear as on the second, and I should be quite content to rest on the reasons already so fully given, if my high respect for the learned members of that Court did not make it becoming that I should, though briefly, indicate for myself the grounds of my opinion.

It seems to me, after careful and anxious consideration, that the contract of which we have evidence in the letters of the 21st and 22nd of April and the 3rd of May, was a completed contract, and conclusively bound the parties to it. There is no dispute about the facts. On the 17th of April the Respondent made an offer to the agent of the Appellants for the purchase of certain plots, distinctly designated, at a certain price, and subject to certain printed conditions and stipulations. On the 21st of April that offer was formally laid before the proprietors of the plots, and on the same day their agent communicated to the Respondent in writing their acceptance of that offer, setting it out in terms, and stating that the proprietors had taken into consideration, in reducing the price, the presumed intention of the Respondent to build upon the property. On the 22nd of April the Respondent replied, not denying his offer, not repudiating the bargain, but stating as to his purpose to build, that the offer had better be reconsidered, "unless you are prepared to leave me at liberty to do as I may think best." That was the single point of objection. In all other respects the contract was approved, and the sole condition of its completion was that of leaving the Respondent at liberty to build, or not to build, as he pleased. The agent of the proprietors announced immediately that he had meant to make no condition: that for the objection there was no ground whatever, and that the Respondent should have all the liberty he desired.

Thereupon, I think, with the Master of the Rolls, that the contract was complete. Everything essential to the completion of it appears on the written documents—the parties, the premises, the conditions, and the price. An offer is made; those who had full power to accept it did accept it, in terms, by their fully authorized agent. The purchaser thinks they are making a fresh condition;

they answer that they are not, and again accept it, simply and absolutely, as he had asked them to do. I cannot conceive that anything remained but to carry out the bargain which was then and thus consummated.

And that this was the view of the Respondent himself is clear from his letter of the 3rd of May. Something had occurred to make him desirous of getting rid of his contract; but he does not deny its existence; he does not question its binding operation; he expresses his sorrow, and makes an appeal *ad misericordiam*, offering to pay "reasonable charges," which he had no need to pay if, as he now says, he never contracted it at all.

And, my Lords, his solicitors thought as he did, for, when the Appellants insisted upon the fulfilment of his undertaking, they wrote after the fullest opportunity of consideration on the 16th of June, "We shall advise Mr. *Miller* that what has occurred creates, as you maintain, a contract mutually binding." Of course, such an opinion determines nothing. But it seems to me a strong thing to ask your Lordships to declare that there was no concluded agreement between the parties when all the Judges concur in holding that the contract fulfils the statutory conditions, and the parties to it and their solicitors have all dealt with it as, in the words of the letter, "mutually binding."

We have had a great deal of ingenious reasoning, founded on the statement in Mr. *White's* letter of the 24th of April, that he had requested Messrs. *Hart & Marten* to forward "the agreement for purchase." It has been said that until the execution of that agreement the transaction was inchoate and not complete. And, undoubtedly, if any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made.

The case of *Chinnock* v. *The Marchioness of Ely* (1), of which we have heard so much, differs from that before us, because there

(1) 4 De G. J. & S. 638.

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the treaty for a sale was pending and not concluded, and the form of contract was to ascertain the terms on which the vendor was prepared to act. But here negotiations had come to an end, the terms were distinctly ascertained, as I have said, with reference to premises, parties, price, and conditions, and stipulations, which, by reference, were as plainly made part of the contract as if they had been repeated in it word by word. And in that state of facts, if I correctly represent it, the judgment of Lord *Westbury* appears to me to be strongly in favour of the Appellants. "If," he says, "there has been a final agreement, and the terms of it are evidenced in a manner to satisfy the *Statute of Frauds*, the agreement shall be binding, though the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although there may be an express term that a formal agreement shall be prepared and signed by the parties." In my apprehension, the contract in this case *was* final and did satisfy the *Statute of Frauds;* and the "agreement for purchase" proposed by Mr. *White* was merely formal and could only contain the terms already fully fixed between the parties.

I do not trouble your Lordships with any observations as to the subtle distinctions which have been taken at the Bar between "intention" and "contract." I am unable, on the undisputed evidence in this case, to see any reason for doubt that what the parties did, in completing the sale, they fully intended to do. The offer by the Respondent was intended; the acceptance by the Appellants was intended; and although the Respondent, for reasons of his own, changed his mind, he did not venture to say that the contract which, at all risks, he declined to carry out, had not fully expressed the intention with which he had originated and concluded it. It seems to me impossible to hold that he did not intend to buy, and that the Appellants did not intend to sell, on the very terms which he now endeavours to repudiate. The correspondence gives no colour to the suggestion that the contract was not final, and was not considered to be final by all the parties to it, because the formal agreement embodying its already settled terms had not been furnished. That suggestion was, in my judgment, an afterthought and a pretence prompted by mere ingenuity, although the binding character of the bargain had been confirmed on every side, to evade the enforcement of its

obligations. In my opinion such an evasion would be equally unwarranted by law and indefensible in morals, and ought not to have the sanction of this House.

I concur with my noble and learned friend on the woolsack that the appeal should be allowed, and the judgment reversed with costs.

LORD BLACKBURN:—

My Lords, I also concur in the judgment proposed.

I quite agree with the Lords Justices that (wholly independent of the *Statute of Frauds*) it is a necessary part of the Plaintiff's case to shew that the two parties had come to a final and complete agreement, for, if not, there was no contract. So long as they are only in negotiation either party may retract; and though the parties may have agreed on all the cardinal points of the intended contract, yet, if some particulars essential to the agreement still remain to be settled afterwards, there is no contract. The parties, in such a case, are still only in negotiation. But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, shew that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed.

This is what I understand to be the meaning of Lord *Cranworth* in *Ridgway* v. *Wharton* (1); and this is the case (2) as stated by Lord *Wensleydale*, and in terms assented to by Lord *St. Leonards*. I think, however, that though they agree on the terms in which the proposition of law is stated, it is obvious that Lord *Wensleydale*, trained in the Courts of Common Law and accustomed to deal with the question of what was to be left to the jury, attached far more weight to the stipulation that there should be a formal agreement, as evidence that the parties were not yet agreed, than

(1) 6 H. L. C. 238. (2) At p. 307.

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did Lord *St. Leonards*, trained in the Courts of Equity, where fact and law are decided together. I think Lord *Wensleydale* would not have come to the same conclusion as Lord *Langdale* did in *Gibbins* v. *The North Eastern Asylum* (1). I doubt whether Lord *St. Leonards* would not have preferred the decision of the Vice-Chancellor to that of Lord *Westbury* in *Chinnock* v. *The Marchioness of Ely* (2).

Parties often do enter into a negotiation meaning that, when they have (or think they have) come to one mind, the result shall be put into formal shape, and then (if on seeing the result in that shape they find they are agreed) signed and made binding; but that each party is to reserve to himself the right to retire from the contract, if, on looking at the formal contract, he finds that though it may represent what he said, it does not represent what he meant to say. Whenever, on the true construction of the evidence, this appears to be the intention, I think that the parties ought not to be held bound till they have executed the formal agreement. If I thought with Lord Justice *Baggallay* that the letters here "left the Defendant a right to believe that the signing of a formal contract was necessary to create a binding agreement," I should also think that the Plaintiffs failed; but I cannot put that construction on the letters. If I understand Lord Justice *James* rightly, he thinks that, in practice, persons who really meant only to enter into such a preliminary negotiation may be held bound contrary to their intention, and I do not doubt that this sometimes happens. I infer, though of this I am not quite sure, that he wishes it to be acanon of construction that, wherever there is a stipulation for a farther and more formal agreement, the previous arrangements should be held to be only of this preliminary nature. I doubt whether such a canon of construction would not often defeat the intention of the parties; but I think it is too late now to introduce it. I think the decisions settle that it is a question of construction whether the parties finally agreed to be bound by the terms, though they were subsequently to have a formal agreement drawn up.

In the present case I think the whole is a question of what is expressed in the three letters, one of the 21st of April, 1875, and

(1) 11 Beav. 1; 17 L. J. (Ch.) 5. (2) 4 De G. J. & S. 638.

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two of the 22nd of April, 1875, and the conditions therein referred to. The contract mentioned in the last of the conditions was to be one embodying the foregoing conditions "and providing for the payment of 10 per cent. deposit." Nothing new could be introduced into it, and the purchaser, if he signed such a contract as is stipulated for there, would not have agreed to anything more than he had already agreed to. And there is nothing that I can find postponing the final assent till the agreement was seen and signed. Unless, therefore, such a new canon of construction as I have alluded to is to be introduced, I think the parties were bound as soon as they both assented to those terms expressed in the conditions. It would have raised quite a different question if a lithographed form of agreement (which did vary from the conditions and introduce important new stipulations about title) had been enclosed in the letters.

On the other points raised I have very little to add. I cannot understand the objection made to the evidence of *White's* authority. And though the construction by which it is held that there can be no memorandum of the agreement unless the writing shews who the parties are, is now inveterate, it is not necessary that they should be named. It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir *James Wigram* in his Treatise calls evidence (1) "to prove intention as an independent fact." In the present case, without receiving any such evidence, there is ample to shew that the Plaintiffs were those designated by the description of "the proprietors."

LORD GORDON :—

My Lords, I concur with your Lordships that in this case the judgment appealed against should be reversed.

The Lords Justices of Appeal concurred with the Master of the Rolls that the word "proprietors" used in the correspondence and in the conditions therein referred to, was sufficiently specific to shew who the parties were who were contracting with the purchaser; and your Lordships are all of the same opinion.

(1) Wigr. on Extrinsic Evidence, Intr. Obs. p. 10.

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But the Court of Appeal differed from the Master of the Rolls in the conclusion to which he came, viz., that there was a valid and binding contract constituted by the correspondence founded on,—and the Court of Appeal was of opinion that as it was provided in the conditions and stipulations printed on the plan, and which formed the conditions of the proposed purchase and sale, that a deed or contract should be afterwards executed by the purchaser providing for the due performance of these conditions of sale,—and that as that deed or contract had not been executed, the transaction of sale was incomplete, and that the purchaser was entitled to resile from it.

I concur with your Lordships in thinking that the judgment come to by the Lords Justices of Appeal is erroneous. I think that the correspondence founded on, constituted a completed contract for the purchase and sale of the lots in question, at the price stipulated, and on the conditions specified in the conditions and stipulations printed on the plan. No doubt these conditions provided for a subsequent and formal deed being executed by the parties; but that deed was only for the purpose of more formally setting forth the conditions upon which the parties had agreed. If there was anything introduced into the proposed deed, which the purchaser considered beyond the terms and conditions on which he purchased the property, he would have been entitled to object, and, if necessary, the proper terms of the deed could have been adjusted at the sight of a Court of Law. But in my view *the contract* between the parties was concluded by the correspondence and the conditions which were referred to and embodied in it. I think, therefore, that the judgment of the Master of the Rolls was right, and that the judgment of the Court of Appeal should be reversed.

Order appealed against reversed. Order of the Master of the Rolls, dated the 22nd of January, 1877, restored. Respondent ordered to pay to Appellants their costs in the Court of Appeal and in this House.

Lords' Journals, 22nd July, 1878.

Solicitors for Appellants: *Duncan, Warren, & Gardner.*
Solicitors for Respondents: *Prior, Bigg, Robinson, & Till.*

[HOUSE OF LORDS.]

THE DIRECTORS, &c., OF THE DUBLIN, WICKLOW, AND WEXFORD RAILWAY COMPANY . . . . . } APPELLANTS (DEFENDANTS BELOW);

AND

JUDITH SLATTERY . . . . . } RESPONDENT (PLAINTIFF BELOW).

H. L. (I.) 1878 *Feb.* 5, 7, 8, 11, 12, 14; *May* 28, 31; *June* 3; *July* 31.

Railway—Injury—Evidence—Question for Jury.

Where there is conflicting evidence on a question of fact, whatever may be the opinion of the Judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury.

S. went to the *Dublin and Kingstown* railway station to accompany a relative who was going by the up train to *Dublin*. It was necessary to cross the line in order to get the ticket. *S.* went through a gate, down a pathway, and across the line in front of the train going to *Dublin*, which was then slowly approaching the station from *Kingstown*. The time was night. There were notice boards warning persons not to cross the line at that point, but there was evidence that the railway servants never interrupted any persons who did cross the line there. *S.* crossed in safety—he obtained a ticket for his relative, who, with two friends, was standing on the bank by the side of the up line. The train to *Dublin* had, in the meantime, arrived, and was standing still. *S.* having got the ticket began to recross the line, being then, not in front of the *Dublin* train, but behind it, in consequence of which that train prevented him seeing anything on the down line from *Dublin;* and he moved on. As he was going on the down line (which ran from *Dublin* to *Kingstown*), the down express train caught him and he was killed. It was a rule of the railway that the express train should always sound a whistle on approaching the station, and the driver of that train swore that he had whistled twice, and some other servants of the railway company swore that they had heard the whistling. The friends of *S.* had, in their evidence for the Plaintiff, sworn that they were in a situation to hear the whistle if it had been sounded, and that they had not heard it: and one of them who could see the down train approaching, swore that he heard the "rumbling" of the approaching train, but heard no whistle:—

Held, that this was a case which was properly left to the jury, for that where there was contradictory evidence on facts, the jurors and not the Judge must decide upon them:—

Diss. Lords HATHERLEY, COLERIDGE, and BLACKBURN, who thought that when there was not, in the first instance, uncontradicted evidence to establish the right of a Plaintiff to a verdict, the Judge might direct a nonsuit or a verdict for the Defendant, and that there was here enough to shew, even on

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the undisputed facts, that the mischief had been the result of *S.'s* own negligence, and that a nonsuit or a verdict for the Defendants ought to have been directed.

Where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury.

Under the circumstances of the case the appeal was dismissed without costs.

THIS was an appeal against a decision of the Court of Exchequer Chamber in *Ireland*, by which a previous decision of the Court of Common Pleas there stood affirmed (1). The action was brought by *Judith Slattery*, the widow of *John Slattery*, deceased, on behalf of herself and children, to recover damages from the Defendants in respect of the death of her late husband, which, in her plaint, she alleged to have been occasioned by the negligence of the Defendants.

The first count alleged negligence on the part of the Defendants expressly describing as negligence the leaving a gate unfastened without any person to watch or attend the same, in not providing a safe mode of crossing the line opposite the gate, in negligently omitting to light the station, and to whistle before, or signal the arrival of, the express train. The second count alleged negligence on the part of the Defendants in omitting to take proper care of, or proper precaution in relation to the crossing, so as to permit persons lawfully using the same to cross with safety. The third count alleged negligence in the management and driving of the express train.

The Defendants pleaded as to the different counts, first denying the alleged negligence; second, a plea of contributory negligence; and thirdly, they denied that the deceased was lawfully crossing the line.

The issues, settled in the usual way, were first, whether there was any such negligence on the part of the Defendants as alleged; secondly, whether the defence of contributory negligence was not true in substance and in fact; and thirdly, whether the deceased was lawfully crossing the line.

(1) Ir. Rep. 8 Com. Law, 531, and 10 Com. Law, 256.

The cause had been twice tried. In the first instance it was tried at the *Wicklow* Summer Assizes, 1873, before Mr. Baron *Fitzgerald* and a special jury, when a verdict was given for the Plaintiff. A new trial was granted on the ground of the improper reception of some evidence, and the case came on again for trial at the *Wicklow* Spring Assizes, 1874, before Lord Chief Baron *Palles*, and a special jury, when a verdict was again given for the Plaintiff, and the damages assessed at £1205. The following is a summary of the facts as stated by Mr. Justice *Morris*, in moving the judgment of the Court of Common Pleas:—

On the 9th of May, 1873, the deceased accompanied a cousin of his, *John James Slattery*, to the *Lansdowne Road Station* to see him off by the last train which leaves *Kingstown* at 11·30 P.M. for *Dublin*. Two friends named *Farrelly* and *Darcy* were with them. They reached *Lansdowne Road Station* about eight or nine minutes before twelve. The deceased crossed the road by the *Horse Shoe Gate* from the *Serpentine Avenue*, just before the up-train to *Dublin* reached the *Lansdowne Road Station*. The deceased was the first of the four, and passed the gate and crossed the line to the ticket station on the opposite side, just before the train came up—that train coming up slowly and being about forty yards distant. The deceased got the ticket, and began to return to his friends, and was crossing the line again, being then behind the carriages of the train, and therefore incapable of seeing either of the lines in the direction of *Dublin*. The *Dublin* train was then stationary. He passed in the rear of that train, and went on the down line, and an express train coming down that line caught him and killed him. *Darcy*, who was on the opposite side, and whose view was not obstructed by the stationary up-train, saw the express train coming, but had no means whatsoever of conveying a warning to the deceased. It appeared that there were notices not to cross the lines at the *Horse Shoe Gate*, but that persons, whether going or not going as passengers on the line, frequently did cross at the *Horse Shoe Gate*, and were not prevented from doing so by the Defendants' servants, and that the same was the case with persons residing at the *Serpentine Avenue*, who arriving from *Kingstown* got out of the carriages, went to the rear of the train and crossed by that level crossing where *Slattery* was killed.

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The Plaintiff's witnesses, on cross-examination, denied that they had heard any whistling from the express train, Mr. *Darcy* stating that though he saw and noticed the approach of that train, and heard its rumbling, he had not heard any whistling from it.

At the close of the Plaintiff's case, the counsel for the Defendants submitted that there was no evidence of negligence on the part of the Defendants to be left to the jury, that even on the Plaintiff's evidence there was contributory negligence shewn, and that the deceased was a trespasser, and therefore that the learned Lord Chief Baron ought to nonsuit the Plaintiff. His Lordship declined to do so, and the Defendants then set up, in answer to the action, that there were notices which forbad the crossing the line at that point, and that it was a rule for the driver of the express train to whistle on approaching the station, that he whistled on that occasion in the usual manner more than once, and that the express train had lights in front, so that if the deceased had taken any ordinary precautions when about to cross the line he must have heard the whistle and might have seen the lights. At the close of the Defendants' case the counsel for the Defendants submitted that the Lord Chief Baron ought to direct a verdict for the Defendants. His Lordship declined to give this direction, but left the case to the jury, observing that if the deceased was upon the line by leave of the Defendants, as to which the evidence as to persons constantly crossing the line without being prevented, was a matter to be considered, he must be treated to have been lawfully there. As to the question of negligence by the Defendants, his Lordship said that to sustain this action mere neglect by the Defendants of precautions which the jurymen might consider proper for the protection of passengers would not be sufficient, and he left it to them to consider whether the company had held out to the public that persons accompanying intending passengers might pass along the path (called in the trial the wire-path) go through the *Horse Shoe Gate*, cross the railway at the crossing opposite that gate, and afterwards recross the railway at the same crossing, and that being so, if the jurymen thought that the deceased had so acted he was entitled from the Defendants to that reasonable care to prevent injury to him from such unusual danger as a reasonable man, though exercising due care,

was not bound to foresee, and that the omission of such reasonable care on the part of the Defendants would constitute negligence in them. His Lordship also called the attention of the jurymen to the contradictory evidence as to the whistling, and said that if the whistling had taken place the verdict must be for the Defendants on the question of negligence; or, on the other hand, the jurymen must say whether the death had been occasioned by the omission to whistle, and whether the whistling was itself a reasonable and proper precaution, and the omission of it an act of negligence, and whether it had been omitted; and if so, then the verdict must be for the Plaintiff.

The jurors found that the Defendants by the conduct of their servants did hold out to the public that persons accompanying intending passengers might pass along the path through the *Horse Shoe Gate*, and cross and re-cross the railway at the crossing opposite the gate; that the deceased was at the time of the accident lawfully using the line; that the Defendants had been guilty of negligence; and that the deceased had not been guilty of contributory negligence; and they found a verdict for the Plaintiff, damages £1205, to be divided among the widow and children.

A motion was made to set aside this verdict and enter it for the Defendants, but the Court of Common Pleas, consisting of Lord Chief Justice *Monahan*, Mr. Justice *Keogh*, and Mr. Justice *Morris*, discharged the rule for that purpose. On appeal, the Judges in the Court of Exchequer Chamber were equally divided, Lord Chief Justice *Whiteside*, Mr. Baron *Deasy*, and Mr. Justice *Barry*, thinking that the judgment ought to be reversed, while Lord Chief Baron *Palles*, Mr. Baron *Fitzgerald*, and Mr. Baron *Dowse*, were for affirming it. The judgment thereupon stood affirmed. This appeal was then brought. The case was twice argued.

Sir *H. James*, Q.C., Mr. *Piers White*, Q.C., and Mr. *W. Anderson* (the latter two gentlemen of the Irish Bar), appeared for the Appellants.

The Attorney-General for Ireland (Mr. *Gibson*, Q.C.), Mr. *Hemphill*, Q.C., and Mr. *Hamilton* (all of the Irish Bar), and Mr. *A. M. Sullivan*, were for the Respondent.

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For the Appellants it was contended that the deceased was either a trespasser or a mere licensee, and in either character was not entitled to look for protection from the company, but was bound to take care of himself; that he had not done so; that he might have heard the whistling of the express train, or if he had not heard it, he was bound to look up and down the line; that if he had so looked he must have seen the express train which beyond all doubt was carrying lights, and on seeing the lights he ought to have waited till the train had passed; or if he chose with that warning of danger to attempt to cross the down line while the express train was approaching, he incurred the responsibility of the consequences, for which the Appellants were in no way answerable. It was alleged that the evidence did not shew any negligence on the part of the Appellants such as could be considered as occasioning the mischief, while it did shew such conduct on the part of the deceased as amounted, at the very least, to contributory negligence, and under such circumstances it was the duty of the Judge at the trial to direct a verdict for the Defendants.

For the Respondent it was contended that the deceased was neither a trespasser nor a mere licensee, but was one of the public using and entitled to use the railway; that he had a right to cross the line as he did, for that by the practice of the Appellants no obstruction was presented to prevent any person from crossing the line at that spot; that it was the duty of the express train to sound the whistle on approaching the station, that that duty had in this instance been neglected, so that no warning was given; that the friends of the deceased who were in a position to hear the whistle if it had been sounded, did not hear it, and that consequently negligence on the part of the Appellants was fully made out, and being so, could not be met by the pretence of negligence on the part of the deceased, since he had not received any warning which might have put him on his guard; and, under these circumstances, it was the duty of the Judge to leave the question of fact to the consideration of the jury, and he had no right whatever to withdraw the case from the jury, and to take upon himself the decision of a matter which depended on conflicting evidence,

and was therefore entirely within the province of a jury to decide.

The following cases were cited and commented on:—*Stubley* v. *London and North Western Railway Company* (1); *Cliff* v. *Midland Railway Company* (2); *Ellis* v. *Great Western Railway Company* (3); *Crafter* v. *Metropolitan Railway Company* (4); *Bilbee* v. *London and Brighton Railway Company* (5); *Wright* v. *North Western Railway Company* (6); *Wilkinson* v. *Fairrie* (7); *Sullivan* v. *Walker* (8); *Tooney* v. *London and Brighton Railway Company* (9); *Indermaur* v. *Dames* (10); *Cotton* v. *Wood* (11); *Lewis* v. *London, Chatham, and Dover Railway Company* (12); *Skelton* v. *London and North Western Railway Company* (13); *Falkener* v. *Great Southern and Western of Ireland Railway Company* (14); *Adams* v. *Lancashire and Yorkshire Railway Company* (15); *Ryder* v. *Wombwell* (16); *Wyatt* v. *Great Western Railway Company* (17); *Radley* v. *London and North Western Railway Company* (18); *Bridge* v. *Grand Junction Railway Company* (19); *James* v. *Great Western Railway Company* (20); *Siner* v. *Great Western Railway Company* (21); *Metropolitan Railway Company* v. *Jackson* (22); *Stapley* v. *London and Brighton Railway Company* (23); *Cockle* v. *South Eastern Railway Company* (24); *North Eastern Railway Company* v. *Wanless* (25); *Holmes* v. *North Eastern Railway Company* (26); *Gee* v. *Metropolitan Railway Company* (27); *Nicholson* v. *Lancashire and Yorkshire Railway Company* (28); *Bridges* v. *North London Railway Company* (29).

(1) Law Rep. 1 Ex. 13.
(2) Law Rep. 5 Q. B. 258.
(3) Law Rep. 9 C. P. 551.
(4) Law Rep. 1 C. P. 300.
(5) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.
(6) 1 Q. B. D. 252.
(7) 1 H. & C. 633.
(8) 14 Ir. Com. Law Rep. 460.
(9) 3 C. B. (N.S.) 146; 27 L. J. (C.P.) 39.
(10) Law Rep. 1 C. P. 274.
(11) 8 C. B. (N.S.) 569; 29 L. J. (C.P.) 333.
(12) Law Rep. 9 Q. B. 66.
(13) Law Rep. 2 C. P. 631.
(14) Ir. Rep. 5 Com. Law, 243.
(15) Law Rep. 4 C. P. 739.
(16) Law Rep. 4 Ex. 32.
(17) 6 B. & S. 709.
(18) 1 App. Cas. 754.
(19) 3 M. & W. 244.
(20) Law Rep. 2 C. P. 634, n.
(21) Law Rep. 4 Ex. 119.
(22) 3 App. Cas. 193.
(23) Law Rep. 1 Ex. 21.
(24) Law Rep. 7 C. P. 321.
(25) Law Rep. 7 H. L. 12.
(26) Law Rep. 4 Ex. 254.
(27) Law Rep. 8 Q. B. 161.
(28) 3 H. & C. 534.
(29) Law Rep. 7 H. L. 213.

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Lord Cairns, L.C.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, in this case the Respondent, the widow of a man who was killed by a locomotive engine at a level crossing on the railway of the Appellants in May, 1873, brought an action in the Court of Common Pleas in *Ireland* to recover damages from the Appellants for their negligence in the management of their railway, by which negligence, as she said, the collision occurred, and her husband lost his life.

The two issues raised by the proceedings in the case were, first, whether there was any negligence on the part of the Appellants leading to the collision? and, secondly, whether the deceased might, by the exercise of ordinary care on his part, have avoided the accident? Both these issues were found in favour of the Respondent, and in the result she obtained a verdict, and damages to the amount of £1205, to be distributed between herself and her children. The Appellants obtained a rule nisi or conditional order from the Court of Common Pleas to set aside the verdict for the Plaintiff, and to enter a verdict for the Defendants, pursuant to leave reserved at the trial; or that the verdict should be set aside as being against evidence or against the weight of evidence, and a new trial granted. Cause was shewn against this rule and allowed, and the rule discharged, leaving the verdict for the Plaintiff in the action to stand.

Thereupon the Appellants appealed to the Court of Exchequer Chamber. The appeal could not, according to the practice, raise again the question whether the verdict was against evidence or the weight of evidence; it only raised the question whether the verdict should be entered for the Defendants. On this point the Judges in the Exchequer Chamber in *Ireland* were equally divided, and the verdict for the Plaintiff was therefore directed to stand.

It is this question, and this only, namely, whether the verdict should be entered for the Appellants, the Defendants in the action, which comes before your Lordships by way of appeal.

I must now refer shortly to the facts of the case. The deceased, *John Slattery*, with a cousin of the same name, and two friends, *Darcy* and *Farrelly*, went about 11·40 P.M. on the 9th of May, 1873, towards the *Lansdowne Road Station*, on the railway of the Appellants, from *Kingstown* to *Dublin*. *Darcy* was going

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to *Dublin* from that station. *Slattery* merely went to see him off. Opposite the ticket office at the *Lansdowne Road Station*, that is on the opposite side of the line, there was a gate called a *Horse Shoe Gate*, and from it a level crossing to the ticket office. There was a notice at the *Horse Shoe Gate* "Beware of the trains; do not cross the road except at the road gates," and another notice at the end of a footway leading to the *Horse Shoe Gate*, "Only for railway passengers; any other person using this footway will be liable to penalties for trespass." When *Slattery* and his friends came to the *Horse Shoe Gate*, the train from *Kingstown* to *Dublin* came up on the opposite side and stopped at the station. *Slattery* crossed the line to the ticket office, apparently just in front of the train, as it was coming to a stop. He was next seen at the back of the train coming forward to re-cross the line to where his friends continued to stand, signalling them at the same time to come across. He passed behind the train, across the up rails, on to the six-foot way, and on to the down rails, and just as he reached the down rails an express train from *Dublin* passed through the station, struck him and killed him.

Some question was raised as to whether the deceased was not a trespasser on the line of railway, but this was not seriously pressed, and there was certainly evidence that, whatever might have been the wording of the notice-board, the crossing was used, with the assent of the Appellants, by persons in the position of the deceased and his friends. The jury also found that the deceased was lawfully using the line.

In what respect then was it said that the Appellants had been guilty of negligence leading to the death of *Slattery?* What reasonable care and skill did they fail to use, which if they had used, the mischief might have been avoided? The only negligence alleged against the Appellants was that the express train from *Dublin* did not whistle before, or as it passed through the station, and it was suggested that had it whistled it would have acted as a caution to *Slattery*, and he would not have attempted to cross the line; and farther, that, as a person accustomed to the ways of the station, he would expect that a train passing through without stopping would give notice, by a whistle, of its approach. As to the necessity for whistling, *Rossiter*, the engine-driver, called for

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the Appellants, stated that it was his duty with express trains to whistle passing every station; and although it would, as it seems to me, be difficult to lay down an abstract rule as to the necessity of whistling, it may be taken that the orders given to the engine-drivers shewed that the Appellants considered whistling under the circumstances to be a reasonable and proper precaution, and it might have been, and I think it was, right to tell the jurors that if they found this precaution neglected on this occasion they might consider it to be evidence of negligence on the part of the Appellants.

But how did the evidence stand as to the fact of whistling? As to this *Farrelly* said he did not hear a whistle, but he also committed himself to the statement, that although he saw the lights in front of the engine of the express train, he heard no noise of the train. *Darcy* said he heard no whistle, but he knew it was the express train by the rumbling of it on the bridge, and he would not swear there was no whistling. *John James Slattery* said he heard no whistle. On the other hand, *Doyle*, the gate-porter, distinctly states that the train whistled twice. *Kelly*, the driver of the up train to *Dublin*, says he heard the down train whistling a hundred yards on the *Dublin* side of the *Lansdowne Road Gates*. It was as long a whistle as he ever heard. It was a *Vulcan* engine whistle. *Rossiter*, the engine-driver of the express train, says he began whistling 200 yards on the *Dublin* side of the *Lansdowne Road Station*, and continued to whistle about half-way the length of the platform. *Fagan*, the fireman on the same train, says the same thing, and that the train was going 250 yards whilst the whistle was sounding. *Kavanagh*, the guard of the down train, and *Maher*, the guard of the up train, speak also distinctly to the whistling, and so does *Mulholland*, the porter at the *Lansdowne Road Station*. Evidence to the same effect is given by *Wheelan*, the assistant guard of the up train, and by *Gallagher*, the assistant station-master at the *Lansdowne Road Station*.

There is thus opposed to the evidence of two persons who say they did not hear, which may mean they did not observe, the whistle, and of one who says he did not hear it, but will not swear it did not take place, a body of witnesses, ten in number, including every person whose evidence could be supposed to be material,

all of whom seem to me to be entirely unimpeached and unimpeachable, who state in the most positive way that the whistling did take place.

My Lords, I have already said that your Lordships have not now before you the question of whether the verdict was against evidence, or against the weight of evidence. But I feel bound to say that if that question were now open, I should, without hesitation, be of opinion that a verdict more directly against evidence I have seldom seen. It is stated that the learned Judge before whom the case was tried was not dissatisfied with the verdict. I can only express my surprise that this should have been the case. As it is, it appears to me that the jury, actuated perhaps by feelings of compassion for a Plaintiff who is no doubt much to be pitied, and willing to gratify those feelings at the expense of the Appellants, have found the first issue, that of negligence on the part of the Appellants, for the Respondent, when it ought to have been found for the Appellants. This, however, as I have already said, is not a reason for entering the verdict for the Defendant. It is only a ground for a new trial.

I then come to the second issue, could the deceased, by the exercise of reasonable care and skill on his part, have avoided the collision? In other words was the deceased chargeable with what is called contributory negligence? As to this, my Lords, the facts are very simple. The night was perfectly clear. The line of railway at the *Lansdowne Road Station* was a straight line for several hundred yards. The advancing express train was perfectly lighted. So long as the deceased was standing behind the stationary train he probably could not see up the line to his left hand; but as soon as he passed from behind the train on to the six-foot way, he could see up the line for several hundred yards. If, therefore, on coming on to the six-foot way he had looked up the line to his left he must have seen the express train, and his conduct must therefore be viewed as between two alternatives. Either he looked up and saw the train advancing, and took on himself the responsibility of getting across before it came close, or he did not look up the line at all. It was to this point that the great argument at your Lordships' bar was addressed, and it is on this part of the case that I have looked with a degree of doubt

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which is increased by finding that the view taken by some of your Lordships, for whose opinion I have the greatest respect, differs from that which I have ultimately formed. The Appellants contend that even assuming that there was negligence on their part in not whistling, still that on the facts which were not in controversy the Judge should have ordered the verdict to be entered for them, because the deceased either did see or might have seen the advancing train, and it was therefore his carelessness and not that of the Appellants which caused the accident.

My Lords, I should by no means wish to say that a case in which such a course should be taken might not arise, and indeed had the facts in the present case been only slightly different from what they are, I should have been disposed to accede to the Appellants' argument. If a railway train, which ought to whistle when passing through a station, were to pass through without whistling, and a man were, in broad daylight, and without anything, either in the structure of the line or otherwise, to obstruct his view, to cross in front of the advancing train and to be killed, I should think the Judge ought to tell the jury that it was the folly and recklessness of the man, and not the carelessness of the company, which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *The Metropolitan Railway Company* (1), an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling, with the accident to the man who rushed, with his eyes open, on his own destruction.

But in the present case the facts are materially different. It was not in the daytime, but at night, although the night was clear. As the deceased stood on the platform of the station he was behind the train which was at rest, and probably would not see the train which was advancing. When he reached the six-foot way he might, no doubt, have seen the advancing train had he stopped and looked to his left. But then he appears to have been in an anxious and perhaps flurried state of mind, desiring to bring his friend across, in time to obtain a ticket for the train which was in the station, and was about to leave. He might therefore be supposed when he got to the six-foot way to have omitted, in his

(1) 3 App. Cas. 193.

haste, the precaution of stopping and looking up the line to his left, while on the other hand, had the advancing train whistled, as on this hypothesis it failed to do, his attention would have been called to the danger, and his movement across the line might have been arrested. Now I cannot say that these considerations ought to have been withdrawn from the jury. I think they should have been submitted to the jury, in order that the jury might say whether the absence of whistling on the part of the train, or the want of reasonable care on the part of the deceased, was the *causa causans* of the accident. Were the question one of a new trial on the ground of the verdict being against evidence, just as I should have thought the evidence shewed that the whistle had not been neglected, I should probably also have thought that, even had there been no whistling, the evidence failed to satisfy me that it was the want of whistling which occasioned the death. But that I repeat is not the question. The question is whether, the evidence being such as I have described, the Judge ought to have taken the case out of the hands of the jury in the first instance. I am not aware of any authority for this being done, and none of the cases cited in the course of the argument can, in my opinion, be looked on as an authority for such a course.

I certainly cannot look on the result of this litigation as satisfactory. The Appellants will, I fear, have to pay a sum for which I cannot think they ought to have been made liable, and the Respondent and her children will recover money to which I do not think that their legal right is established. But I cannot seek to prevent this by proposing to your Lordships, on the only part of the case which is brought for your determination, to do what it appears to me would seriously encroach upon the legitimate province of a jury.

I must therefore advise your Lordships to dismiss this appeal. Your Lordships are accustomed, in dismissing an appeal, to dismiss it with costs, and your Lordships would not, I apprehend, consider that a difference of opinion among the noble and learned Lords under whose consideration the case falls, was of itself a sufficient reason for departing from the general rule. In the present case, however, the Court of Exchequer Chamber in *Ireland*, consisting of six Judges, was equally divided, and the Appellants could

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hardly have done otherwise than submit the case to be reviewed before the Queen in her Court of Parliament. Your Lordships may possibly, under these circumstances, think that the appeal should be dismissed without costs.

LORD HATHERLEY:—

My Lords, the question in this case is one of considerable importance as to the duty of the Judge on the trial of an action in which the Plaintiff, as executrix of her husband, sued for damages against the Defendants in respect of his death, occasioned by their negligence or that of their servants. Ought he to have withdrawn the consideration of the case from the jury if there had been contributory negligence on the part of the Plaintiff's husband, to which, in part at least, the injury must be attributed; and if such contributory negligence be averred and proved, and such proof be not controverted by any evidence on the part of the Plaintiff to rebut it?

This class of cases has been of frequent occurrence of late, owing to the liability to accident being multiplied by the use of railroads, and their consideration has given rise to much difference of opinion on the part of Judges. In the present case the Judges in the Court of Exchequer Chamber in *Ireland*, from which this appeal is brought, were equally divided in opinion.

The position of the parties and the general facts of the case have been sufficiently stated by the Lord Chancellor.

I will, in the first place, state my concurrence with Mr. Justice *Barry's* opinion in the Court below (1), viz., "When once a Plaintiff has adduced such evidence as, if uncontradicted, would justify and sustain a verdict, no amount of contradictory evidence will justify the withdrawal of the case from the jury." But I concur, also, in the opinion expressed by Chief Baron *Palles* (2), that "When there is proved, as part of the Plaintiff's case, or proved in the Defendants' case and admitted by the Plaintiff, an act of the Plaintiff which *per se* amounts to negligence, and when it appears that such act caused or directly contributed to the injury, the Defendant is entitled to have the case withdrawn from the jury."

(1) Ir. Rep. 10 Com. Law, at p. 270. (2) Ir. Rep. 10 Com. Law, 287.

Here I assume negligence to have been proved as against the Defendants, by the finding of the jury with regard to the alleged omission of the Defendants servants to whistle, on passing through the station, although I may be surprised at their finding such a verdict on the evidence; and if the case had stood there alone, the verdict would not be open to challenge in this stage of the proceedings, and the appeal ought to be dismissed.

But there is another and distinct issue raised by a special plea of the Defendants, namely, that the Plaintiff's husband contributed, by his own negligence, to the injury which he suffered, viz., his death. It appears that the course in *Ireland* is to raise such a case by a plea, but the form in which it is raised can make no difference in the substance of the case. Whether introduced under the plea of "not guilty," or by a special plea, such a defence must be proved by the party asserting it. But if such contributory negligence be admitted by the Plaintiff, or be proved by the Plaintiff's witnesses while establishing negligence against the Defendants, I do not think there is anything left for the jury to decide, there being no contest of fact.

As was well put, I think, during the argument by the Appellant's counsel, if the Plaintiff were a person injured by the accident, instead of the executrix of a person killed, and had proved the absence of whistling (if that be negligence), or any other omission of duty on the part of the Defendants, but at the same time had stated that he saw the train coming, but had laid a wager that he would run across the line in time to avoid it, I should think that in such a case the Judge would be bound to direct a verdict to be entered for the Defendants. Mr. Justice *Morris* puts it thus (1): "If there be glaring neglect on the part of the sufferer, so as to repair the neglect of the Defendants," he should be disposed to say that the Judge ought to withdraw the case from the jury; but he was of opinion that such glaring neglect had not been shewn on the part of the deceased.

Let me briefly, then, examine the evidence on this head. I assume the non-whistling to be proved, I assume that to be actionable negligence, but these five other points are proved by the Plaintiff's witnesses: (1.) The deceased first crossed the line

(1) Ir. Rep. 8 Com. Law, at p. 538.

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in front of the up-train from *Kingstown* (the Plaintiff's witnesses proved this), and then the train drew up on the side to which deceased had crossed, and in front of him. (2.) He could not see anything coming on the line, owing to the *Kingstown* train being in front of him, but he recrossed the line at the end of the train, and he could then have seen the lights of an approaching train, had he looked out as soon as he had moved on to the line. (3.) Standing between the up and down lines, he could look up and down the line. (4.) He stood beckoning to his former companions, and was visible to them whilst so doing, therefore he was beyond the end of the *Kingstown* train; and after so beckoning, he advanced on the line, and so was caught by the down train (all the witnesses for the Plaintiff state this). (5) The engine had lights, which were distinctly seen by two of the Plaintiff's witnesses.

Now it is part of the Plaintiff's case that the deceased was well acquainted with the course of management of the line, and was led by that course to expect a warning by means of a whistle before the down train could arrive at the station. By the same reasoning, he knew that a down train was expected, but I pass that by, and ask whether it is not negligence for a man to pass over a railway at all, without looking to see whether or not a train is approaching. It is clear that the lights of the down train were visible to anyone looking before he crossed the line, but the deceased was beckoning to his friends, and they saw the lights which he did not. If he saw the lights, his negligence was greater in his attempting to cross; if he did not see the lights, he cannot have looked for them.

It appears to me then, I confess, that the proper course, upon the facts above established (not by conflicting evidence, but by the Plaintiff's witnesses), would have been to nonsuit the Plaintiff (or, perhaps, as the case was not in a stage for a nonsuit, the question would be whether the Judge ought not to have directed a verdict for the Defendants), because, assuming that she had proved negligence on the part of the Defendants in not whistling, she had likewise proved negligence on the part of the deceased in crossing a line of railway without looking to see if the line was clear; and though the jury might infer that had the engine whistled the man would not have crossed, yet this could be no

answer to the observation that in crossing he did not take the ordinary precautions which every reasonable man would take, of looking to see whether the line was clear. Suppose the lights had been omitted but the engine had whistled, would not the deceased have been guilty of glaring negligence in crossing in spite of the whistling, and would the omission of the lights have justified his so crossing?

I cannot consider it a proper question for a Judge to ask the jury whether a man's walking or running across a line of railway on which a train is expected, without looking to see whether a train be in sight, be an act of negligence. As Mr. Justice *Montague Smith* observed in *Siner* v. *Great Western Railway Company* (1), "Judges cannot denude themselves of the knowledge of the incidents of railway travelling, which is common to us all." If it is to be said that the jurors must draw the inference of negligence from the facts, the same might have been said as to their duty in drawing an inference in an action for goods supplied to an infant, whether they are or are not "necessaries," regard being had to the infant's position in life. But this was not done in *Ryder* v. *Wombwell* (2). In that case, Mr. Justice *Willes* gave the judgment of the Court, which Court consisted of himself and Justices *Byles*, *Blackburn*, *Montague Smith*, and *Lush*. And he cites (3), with approbation, the opinion of Mr. Justice *Maule* in *Jewell* v. *Parr* (4), and of Mr. Justice *Williams* in *Tooney* v. *London and Brighton Railway Company* (5), to the effect that it is not enough to say there was some evidence, but that there must, in order to justify a Judge in leaving the case to a jury, be evidence from which a jury may reasonably conclude the issue to be proved.

I conclude, as I began, by saying that I do not hold it to be the office of the Judge to weigh or balance conflicting evidence, however strongly the evidence on one side may, in his judgment, preponderate; that question is for the jury, but he may and ought to tell the jurymen where there is no evidence at all on one side, that they will not be justified in law in finding contrary

(1) Law Rep. 4 Ex. at p. 123.
(2) Ibid. 32.
(3) Ibid. at p. 39.
(4) 13 C. B. 909; 22 L. J. (C.P.) 253.
(5) 27 L. J. (C.P.) 39.

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to the only evidence given, or in inferring that which no reasonable man would infer from the evidence. I do not think it would be reasonable to infer that a man exercised due caution in walking on a railway at night without looking about him.

I am aware that the Judges before whom the case came below expressed themselves not to be dissatisfied with the verdict, but I observe at the same time Mr. Justice *Morris* is of opinion that "glaring negligence" on the part of the deceased would prevent the Plaintiff recovering. It appears to me that such glaring negligence is established here.

I do not think that the omitting to whistle can be held, like opening a gate (1), to be a direct invitation to pass the line, otherwise a man might walk across it at any time, though seeing the train approaching, and this distinguishes the case from *Wanless' case.* For when a person has been once invited to enter on the line, it was held that the consequences of that ill-timed invitation must be borne by the company. I think rightly; for if a railway porter were to lead a person, undertaking to guide him safely over the line, that person might be well excused for trusting implicitly to the representation thus made that he could safely cross.

Again, the case may be different if a special statutory duty were imposed on the company of whistling at a station, for then it might be said this mode of warning strangers, and no other, is what the stranger is entitled to depend upon. But I rest my opinion on this: a person transacting the ordinary business of life is bound to take the ordinary precautions that the nature of the act he is about to enter upon would induce any reasonable man to take. If he is about to cross a road, where from the nature of the traffic there must always be a risk to encounter, he must take the ordinary care for that particular case. It does not appear to me to be too exacting, to say that a person preparing to cross a railroad at night without requesting any assistance, should look each way before he crosses.

My opinion, therefore, is adverse to the Respondent, and I think a verdict should have been entered for the Defendants, and that the judgment here complained of should be reversed.

(1) *North Eastern Railway Company* v. *Wanless*, Law Rep. 7 H. L. 12.

I need not say that the opinion expressed by my noble and learned friend on the woolsack, shared as it is by a majority of your Lordships, makes me less confident than I should otherwise have been in this view; but, after the best consideration, I have felt myself bound to adhere to the impression made on me by the argument for the Appellants.

LORD PENZANCE:—

My Lords, before inquiring whether there was evidence proper to be left to the jury upon the issue respecting the Defendants' negligence, I will state to your Lordships my view of the meaning of that issue, a matter which lies at the root of the controversies and differences of opinion to which the present case has given rise.

The Plaintiff in the declaration alleges that the Defendants "so negligently and carelessly conducted themselves" in various particulars, "that *John Slattery*, whilst lawfully crossing" the line, "was struck and injured by the train proceeding from *Dublin*," &c.; and that he died of the accident. To this the Defendants plead "that there was no such negligent and careless conduct on the part of the Defendants as alleged." This issue affirms that the injury happened by reason of the Defendants' negligence; but in doing so it is not intended to affirm that it so happened wholly by the Defendants' negligence to the exclusion of all other concurrent causes. If it were so intended, the subsequent issue raised by the Defendants as to the Plaintiff's contributory negligence would be superfluous and useless; for if the accident happened wholly by reason of the Defendants' negligence, to the exclusion of concurrent causes, there is no room for the assertion that the deceased man contributed to cause it. In other words, the only finding upon the first issue, under which the second issue could possibly arise, is a finding that the accident did happen by reason of the Defendants' neglect, leaving open the farther question whether other causes, and among them the negligent conduct of the deceased, contributed to it. The question, therefore, is whether there was evidence fit to be considered by the jury in support of the issue so understood.

I will not detain your Lordships at any length in discussing the

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facts, inasmuch as the question is not whether the Defendants' negligence and its connection with the accident was reasonably established by the evidence, but only whether the evidence of negligence on the part of the Defendants which the Plaintiff gave, was evidence which was properly submitted to the jury.

To whatever degree the Plaintiff's husband may have been to blame in the course which he took, and in whatever degree that course may have contributed to the accident which befel him, I think it is clear that the absence of that whistling which is usual in all railways as the signal of an approaching train, may reasonably have been considered by the jury to have influenced the course taken by the deceased man, and thus caused the accident. I think it is impossible to deny this; it might be that being accustomed to the station, and aware of the usual time at which the train from *Dublin* passed, he expected the whistle as usual, and not hearing it, did not think the train was coming; or it might be that had the whistle sounded it would have awakened him to his danger in attempting to cross the line, though his mind was so occupied with the desire of getting his friends across to where he stood that he failed to hear the sound of the wheels, and did not look up the line, as he ought to have done, to see if a train was coming.

In these two ways at least, and perhaps in others, the accident might, in the opinion of jurymen, who are the lawful judges upon the question, have been attributed to the absence of whistling, although they might also have been of opinion that had the deceased man used anything like ordinary care the danger caused by the want of whistling, which in the result proved fatal, might well have been avoided. If so, it was proper to take the opinion of the jurymen on the subject, asking them, first, whether there was in fact any whistling; if not, then whether the absence of such whistling constituted a want of due and reasonable care on the part of the Defendants, regard being had to the regulations of the company and to the existence of the level crossing, used as it was for people to pass over it freely and without restraint; and lastly, whether the accident was in their opinion referable to the want of reasonable care on the part of the company's servants in that respect.

All these matters are properly within the cognizance of a jury, upon whom the duty devolves of determining, in actions of this nature, the entire question of negligence. There are, no doubt, cases in which there is either no reasonable evidence of the want of due and reasonable care in the Defendants' conduct, or, if such want exists, of its connection with the accident in the relation of cause and effect. And in such cases it is the recognised and unquestioned duty of the Judge to withdraw the case from the jury, upon the simple ground that there is no evidence in support of the issue fit for them to take into their consideration.

This could not be done in the present case, for it is, I think impossible to say that on the question whether the whistle was sounded or not, the oath of at least two witnesses who were on the spot and within hearing, was not evidence which jurors were bound to consider, in contrast with the positive evidence given by several witnesses on the other side, that the whistle was in fact sounded as usual. And it is, I think, equally impossible to say, as I have just pointed out, that the absence of this particular species of notice of an advancing train might not have influenced the Plaintiff's husband in attempting to cross the line, and so caused the accident.

I pass, therefore, to the second question, which is this: whether, assuming evidence proper for the consideration of the jury on the issue of the Defendants' negligence to have been given by the Plaintiff, and left to the jury accordingly, the Judge at the trial ought to have decided for himself the second issue on the record, which is, whether the Plaintiff's husband was guilty of contributory negligence or not, and having decided it in the affirmative, to have withdrawn it from the jury, and directed the jury to find the verdict upon that issue for the Defendants.

My Lords, the question so stated, I think, hardly admits of argument. Here is a question which in its nature is a question of fact; it forms the subject of a distinct issue of fact joined on the record, and it is moreover one of the questions of fact which, according to the practice of the Irish Courts, have been stated, on the proceedings, as questions to be tried by the jury. Upon what ground, then, can it be withdrawn from the jury, and decided by the Judge, if reasonable evidence has been given in its support?

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I was very glad to notice that the learned counsel for the Appellants were somewhat unwilling to affirm the general proposition that it was competent to the Judge so to deal with the issue, upon the ground that the evidence was so cogent that no two opinions could reasonably be entertained upon its effect. Such a proposition would have involved the assertion of a similar right on the part of a Judge in any proceeding, civil or criminal, where the evidence was similarly cogent and conclusive; and to admit this, would be to confound the functions of the Judge and the jury, as they constitutionally exist, in a most unfortunate degree.

It was, I think, suggested in the course of the argument that the proposition might be put in this way, that, when the evidence upon the affirmative of an issue is very cogent, the onus of proof is thereby shifted, and evidence rendered necessary to rebut it on the other side, and if no such evidence is produced, the Judge may then declare that there is no evidence to go to the jury of the negative of the issue; and on that ground take upon himself to decide that the affirmative has been established.

My Lords, I cannot subscribe to such a proposition. I entirely fail to see how the shifting of the onus or burthen of proof in the course of the trial can alter the issue itself, which is an affirmative and not a negative one, or change its nature, or vary the tribunal by which it is to be decided. Whether the Plaintiff gives any evidence or not, the affirmative of the issue in question is none the less ultimately upon the Defendant, and he must satisfy the jury, and not the Judge, that the evidence has established it.

If the above mode of reasoning were accepted, it would result in this: that whenever the evidence for the affirmative of an issue is sufficiently strong to make a *primâ facie* case calling for an answer on the other side, and thereby shifting the burthen of proof, and no evidence in answer is given, the Judge, instead of the jury, is to decide the issue—a result which, as I have just said, would be an unconstitutional innovation of a serious if not an alarming character.

To understand the full effect of such a principle it is only necessary to observe its results in a criminal case. In the majority of criminal cases the prisoner gives no evidence at all; suppose then that the prosecutor makes a *primâ facie* case—so strong a

case perhaps that, without some evidence in answer or explanation no one can doubt of the prisoner's guilt; does this by shifting the onus of proof, also shift from the jury to the Judge the duty of deciding upon the effect of the prosecutor's evidence, and is the Judge entitled to direct the jurymen that they must find a verdict for the Crown?

In these difficulties the learned counsel for the Appellants put the question of contributory negligence in a different way. He contended that the two issues of the Defendants' negligence on the one hand, and the negligence of the Plaintiff's husband on the other, should be considered together, and that, looking to the strong evidence which the case presented of negligence in the Plaintiff's husband by which the accident was really caused, there was no evidence to go to the jury of negligence on the Defendants' part. And he cited a number of cases in which the Courts, in discussing whether there was evidence fit to go to the jury of the Defendants' negligence or not, entered into a consideration of the Plaintiff's conduct, and discussed the question how far the accident was in reality brought about by that conduct.

I will say a word presently upon the propriety of dealing with the two questions of the Defendants' negligence and the Plaintiff's contributory negligence together, as forming parts of one proposition, but I will first address myself to the cases.

Now what I will ask your Lordships to observe in respect of these cases is this: that in all of them the question which the Court was deciding was not whether the Plaintiff was negligent, but whether there was evidence to go to the jury of negligence by the Defendants such as caused the injury. In discussing such a matter it is inevitable, in many cases, that the conduct of the Plaintiff should come in question, not for the purpose of establishing contributory negligence on his part (a question which does not arise and is immaterial except upon the assumption that the accident was in some degree caused by the Defendants' negligence), but for the purpose of tracing the true cause of the accident, and thereby discovering whether the evidence, referring the accident to the Defendants' negligence, is of such a character that it ought to be submitted to the jury.

One method of proving that a thing is not black is, by proving

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that it is white, and one mode of establishing that an accident was in no degree caused by the negligence of the Defendants, is by proof that it was wholly and entirely caused by the negligent conduct of the Plaintiff himself. But in such a method of reasoning the *negligence* of the Defendant's conduct is so little in issue that it is really immaterial; for if the accident was wholly caused by the Plaintiff's own conduct, to the exclusion of any other cause, it could not in any degree have been caused by the Defendants' negligence, and so the quality or character of the Defendant's conduct, whether negligent or imprudent, or wise or careful, is wholly beside the question.

Although therefore the learned Judges in many of the cases quoted have commented upon the Plaintiff's conduct as wanting in due and reasonable care, they have not done so in the course of deciding any issue raised as to the Plaintiff's negligence; still less have they done so, or decided anything in reference to an issue of *contributory* negligence on the Plaintiff's part—an issue which does not arise until the Defendants' negligence and its relation to the accident have been first established, and which in the absence of that conclusion is immaterial to the case.

The cases cited therefore by no means support the conclusion at which your Lordships are asked to arrive, for there is not one of them in which the Defendants' negligence, and its relation to the accident being in the opinion of the Court sufficiently supported by evidence to be left to the consideration of the jury, the Court has gone on to decide for itself that the Plaintiff's negligence has also been established.

This being, as I conceive, the true explanation of the decided cases, I will only add that the form of pleading which has been used in this country, namely, the use of the single plea of "not guilty," in place of two separate pleas, one raising the question of the Defendants' negligence, and the other that of the Plaintiff's contributory negligence, has perhaps contributed in some degree to the misapprehension which has arisen as to the true effect of those cases, although it cannot be doubted that these two separate issues, which appear as separate issues on the record in this case, are, in point of law, as much raised by the plea of not guilty as if they had been so separately pleaded.

And this brings me to the discussion of the Appellants' argument that the negligence of the Defendants and the contributory negligence of the Plaintiff should, in actions of this kind, be considered together. The most prominent and effective way, as it seems to me, of putting the case from the Appellants' point of view is this. The Plaintiff's right to recover depends upon the following proposition being established, that the accident was caused by the negligence of the Defendants without the concurrence of any negligence on the Plaintiff's part as a contributory cause of it. And as this proposition is the foundation of the Plaintiff's legal right, the proof of it must devolve upon her. If then the evidence, assuming it to be true, shews a state of things in which no reasonable person could be expected to say that this proposition was established, there is no evidence on the Plaintiff's part proper to be submitted to a jury, and the Judge should direct the jury to find for the Defendants.

This mode of dealing with the matter, it will be observed, by involving the two questions of the Defendants' and the Plaintiff's negligence in one single and entire proposition, throws upon the Plaintiff the burthen of proving, negatively, that he did not contribute to the accident by any negligence of his own. And, as a consequence, it must be competent to the Judge to hold, if the evidence should warrant it, that the Plaintiff had given no evidence fit to be considered by the jury in discharge of that burthen. In this way the proof of the Plaintiff's negligence, in a case like the present, would be legitimately considered by the Judge; and might tend to a legitimate conclusion that that negligence had been the chief cause of the accident, and therefore that there was no evidence fit to be considered by the jury in support of the proposition that the accident happened by reason of the Defendants' negligence, and without any contributory negligence on the Plaintiff's part.

This reasoning appears to me to be satisfactory and free from exception upon the assumption that the principal proposition from which it starts is a correct one in point of law. But, unfortunately for the Appellants, this proposition is, in the present case and on the present pleadings, absolutely untenable. For the Plaintiff has taken no burthen upon herself of disproving the

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negligence of the deceased man; and the negligence of the Defendants on the one hand, and of the deceased on the other, are pleaded, not as part of one proposition, but separately, and are the subject of separate and independent issues.

In her declaration she alleges that the accident was caused by the Defendants' negligence—and there stops; to which the Defendants answer, first, by denying the Plaintiff's allegation, and then by another plea alleging that the deceased might have avoided the consequences of the Defendants' negligence by the use of ordinary care. On these pleas issues are joined, and separate questions raised for the jury: the onus of proof in respect of one of them being on the Plaintiff, and in respect of the other being on the Defendants. It is, I think, impossible to contend, on such a record, that it was competent to the Judge at the trial to confound the two issues together in one proposition, and, throwing the proof of the whole upon the Plaintiff, declare that the verdict must be entered for the Defendants because the Plaintiff had not given evidence, fit to be considered by a jury, to negative the issue which the Defendants had taken upon themselves.

But I ought to add, my Lords, that in my opinion the effect would be precisely the same under the English system of pleading, where the only plea is that of "not guilty." That plea, equally, in my opinion, casts upon the Defendant the burthen of establishing the Plaintiff's contributory negligence. Of course I do not mean that this must be done by evidence produced by the Defendants. The Plaintiff may in the course of his own case produce evidence by which his own negligence, as causing the accident, may plainly appear. But what I intend to say is, that the contributory negligence of the Plaintiff must be established affirmatively, and that the absence of evidence to negative any such negligence will not entitle the Defendants to a verdict as it would do, if the burthen of proving that the accident happened without any such negligence, lay upon the Plaintiff. If any such burthen lay upon the Plaintiff it would certainly have been necessary for him, in the days when pleadings were required to be more precise and strictly accurate than perhaps they are now, to allege in his declaration that the accident happened without any such negligence on his own part as contributed to cause it. And yet I

think I may safely say no such declaration was ever seen. Both in pleading and in practice in this country the contributory negligence of the Plaintiff has always been dealt with as if it was a separate issue from that of the Defendants' negligence, and has always been so presented to the jury, the Judge directing that the affirmative lay upon the Defendants.

The proof of the first issue, which is that of the Defendants' negligence, is upon the Plaintiff; the proof of the second, which is that of contributory negligence, lies upon the Defendants. Upon either of these issues it is competent to the Judge to say negatively that there is not sufficient evidence to go to the jury; but it is no more competent to him to declare affirmatively that one of them is proved than the other. In fact, there is no case that I am aware of, and certainly none was cited, relating either to actions of this kind or to any other form of action, in which the facts and the proper conclusions of fact to be drawn from them being in dispute, the Judge has been held entitled to tell the jury that they were bound to find the issue proved.

I am therefore of opinion that the learned Judge did right at the trial, and that the present appeal should be dismissed.

LORD O'HAGAN:—

My Lords, the principle on which, I think, this case ought to be decided appears to me to be well expressed in the trite maxim, "*Ad questionem juris respondent judices: Ad questionem facti respondent juratores.*" That maxim is old, but cannot be obsolete whilst trial by jury subsists among us.

The questions raised at the trial were questions of fact, and of fact only. According to the Irish practice, they were distinctly formulated on the record. They were two in number: first, whether the Defendants had been guilty of negligence; and, secondly, whether contributory negligence could properly be ascribed to the unfortunate person who lost his life. As questions of fact, they were proper to be submitted to the jury; and the learned Judge who tried the cause was bound, in my opinion, so to submit them.

No doubt, in some cases the Court is warranted to assume to itself the function of withdrawing the matter in controversy from

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the consideration of the jury, as when there is no evidence properly bearing upon it, on which a finding could reasonably be had. This is a function which must necessarily be exercised in the absence of proof of essential facts, or of their connection with the question in issue; and your Lordships have recently had occasion to indicate the limitations and conditions within, and according to which, its exercise should take place.

But here, on both the questions, there was abundant evidence. The doctrine warranting withdrawal, for the want of it, applied to neither; and I have no doubt, notwithstanding the conflict of judicial opinion, that the Judge was not at liberty to direct, whatever may have been, in his own opinion, the preponderance of proof on the one side or the other.

That is the only point for the consideration of your Lordships. You have nothing to do with the weight of the evidence. You have no concern with the propriety of the inferences drawn by the jury. Were it otherwise, I should have paused long and considered much, before adopting a view inconsistent with the solemn findings of two special juries, with which two very able Judges have refused to declare themselves dissatisfied. I might not have been inclined, perhaps, to adopt those findings, but we have now no concern with them; and, whatever they may have been, I am of opinion that the making of them was within the legitimate and the exclusive province of the jury, upon which the Judge had no authority to intrude.

As to the first question, whether the Defendants were guilty of negligence? I cannot see how, possibly, it could have been taken from the jury. I shall not occupy the time of the House by any repetition of the narrative which has been lucidly given to it by my noble and learned friend on the woolsack. I shall only remind your Lordships, that the learned Lord Chief Baron *Palles* rightly confined the attention of the jury to the consideration of the alleged want of whistling, as the one instance of negligence with which they had to do; and that with reference to it there was a large body of testimony and clearly conflicting testimony. Ten witnesses for the Defendants swore that the whistling occurred at the proper time and in the usual way; three witnesses for the Plaintiff swore that, being in a position in which, if it so occurred,

the sound should have reached their ears, they did not hear it. It is impossible not to be struck by the apparent weight of the Defendants' proof. But, as was observed in the Irish Court of Common Pleas, the jury saw the witnesses, and the Judge did not condemn the verdict. And, whether it was right or wrong, the jurors alone were competent, legally and constitutionally, to decide between the ten who testified on the one side and the three who testified on the other.

It was urged, and the authority of an eminent Judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me manifestly legal evidence, which may vary in its value and persuasiveness—which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but at all events cannot be withheld from the jury. And if this be so, there was here a conflict of testimony on which the jurymen, and they alone, were competent to pronounce.

I do not enter at any length on the question, how far the whistling was a precaution which the Defendants were bound to provide for the safety of the public? It seems to me that their own conduct is, on that point, conclusive against them. We heard much of placards; but the rule sought to be enforced by those placards, which were originally designed to prevent people from crossing the line, had been permitted to fall into desuetude. With the full knowledge of the company's servants the crossing had come to be ordinarily and habitually made without the least objection, and the jurors were abundantly warranted in finding that the act of the deceased in making it was a lawful one. If this was so, it seems to me that the Defendants were bound to provide sufficient safeguards for persons encouraged to cross at least by their tacit permission; and that whistling was one of such safeguards is not left to be ascertained by mere conjecture or reasoning, it is established to be such by our own experience of the arrangements for travelling on ordinary lines. It is surely enough

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that, in the particular case, the Defendants by their own conduct admitted the propriety of whistling, and accepted the duty of doing so, for the protection of their passengers and the general public. Their servants proved the orders given to whistle, at the various stations, on the passing of the express trains; and they are not now to be heard in denial of the necessity of such a practice, when they themselves established it, and led people to rely on its continuance and regularity, to their manifest risk if it should be abandoned without notice, or intermitted through neglect. We were told much of the flaring lights, and the means of warning through the noise of the engines and the rushing of the train; but again the Defendants answer their own argument by the fact, that, in addition to these things, they practically admitted the need of something more, and taught the public to expect the signs of danger,—not through one sense only, but by the ear as well as by the eye, by the whistle as well as by the lamp.

And if the warning which the Plaintiff's husband was so justified in expecting was not given, does not the case come within the principle of the decision of your Lordships' House, that when a company, by its servants, negligently leaves open a gate which should be closed, it must be taken to have invited passengers to cross, so as to prevent its escape from responsibility for accident, by reason of their contributory negligence? Here, the omission to whistle was surely as material as was, there, the omission to shut; and the absence of the whistle may as reasonably be taken to have made the Defendants answerable for the consequences, as they would have been if those consequences had arisen from an invitation offered by the unclosed gate. In both cases, caution in crossing the line might have prevented the fatality. In both, or in neither, the default of the company was sufficient to deprive them of reliance on the plea of contributory negligence.

I have no doubt, that, on the first question of fact, the Judge could not properly have given a direction.

And it seems to me as clear that on the second—whether there was contributory negligence?—he had no power to give it. The circumstances establishing such negligence, and the inferences to be drawn from them, were, equally and exclusively, for the con-

sideration of the jury. It was for the jury to find the facts, and to draw the inferences of fact, and the Judge would, in my mind, have transcended his jurisdiction in finding the former or making the latter.

I do not, after all your Lordships have heard, especially from my noble and learned friend who last addressed the House, propose to discuss the ingenious suggestions offered to shew that the evidence of contributory negligence was sufficient to overbear and annihilate that which had been adduced to establish the negligence of the Defendants. I am not unwilling, for the purpose of the argument, to admit that the proof of the Defendants was of the strongest kind: and that a more reasonable or a more intelligent or a more impartial jury might have found for them on the second issue. But the findings taken, at both the trials, must have been based on the notion that the default of the Defendants had so thrown the deceased off his guard, as to dispense him from the exercise of such vigilance and care as might have kept him harmless. I cannot forget that the able Judges who presided at both these trials expressed no dissatisfaction with that view in their reports: and that both of them sustained the verdict in the Court of Exchequer Chamber. My Lords, it seems to me difficult for your Lordships who were not present at those trials,—who did not hear the witnesses,—who are, therefore, comparatively uninformed as to the transactions which were dealt with in the course of them,—should now pronounce in opposition to those learned Judges, that there was really no matter for the consideration of the jury, and that the case was so clear against the verdicts as to make them utterly untenable and without a pretence of justification.

But I do not rest on this. Assuming the evidence of the Defendants to have been as convincing as it has been held to be by some of my noble and learned friends, I am not the less of opinion that it was rightly submitted to the jury. I cannot understand how the mere strength of proof, where there is an issue of fact to be decided, can transfer the right of decision to the Judge. I do not acknowledge the force of the reasoning which would convert an issue in fact into an issue in law, merely because there seems to be a complete preponderance of evidence upon the one

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side, or because there is no evidence on the other. In such circumstances, the Judge may speak strongly, and point out plainly what is the duty of the jurymen; and if they ignorantly or perversely disregard his counsel, and find without evidence or against evidence, the injured party has his remedy, and the law is prompt to rectify the wrong. But I am not aware of any principle, and cannot discover any authority, which can warrant the transfer of jurisdiction and the duty of judgment, on matters of fact, formally submitted to a jury, merely because the case appears to the Judge to be conclusively established on the one side or the other.

Such a doctrine appears to me to be novel and startling. If it were approved, I think, with my noble and learned friend who last addressed the House, that it would be fraught with serious and alarming consequences. It would alter very much the relations of Judge and jury; and it must have application, as he has observed, not in civil causes only, but in criminal also. Now, in a case of murder, with circumstantial evidence of the most conclusive kind, or with direct evidence, equally unimpeached as to its accuracy and as to its veracity, and in the absence of all proof to the contrary, has any one ever heard of a Judge taking upon himself to direct a conviction? Could he do so constitutionally? Could he do so without a manifest invasion of the privileges of the jury?

Those privileges may be abused. The system of trial which involves their maintenance is open to criticism and subject to change. But whilst it subsists it should, in my opinion, subsist in its integrity. The several functions of the Court and the jury should be kept carefully apart. In matters of law the jury should obey the Court; in matters of fact the Court should respect the jury; and both will best execute their great functions by holding in memory the trite old adage with which I began these observations. I shall close them by recalling to the recollection of your Lordships the saying of Lord *Hardwicke* (*R.* v. *Poole* (1)): "It is of the greatest consequence to the law of *England* and to the subject, that the powers of the Judge and jury are kept distinct: that the Judge determines the law, and the jury the fact: and if

(1) K. B. Cas. t. Hardw. 28.

ever they come to be confounded it will prove the confusion and destruction of the law of *England*."

I am of opinion that the appeal should be dismissed, but, for the reasons given by the Lord Chancellor, I concur, though not without some hesitation, that notwithstanding the ordinary rule of your Lordships, the dismissal should be without costs.

LORD SELBORNE:—

My Lords, if I had to decide this case on the weight of evidence, I should certainly give credit to the witnesses who say that the usual notice by whistling of the approach of the down express train was properly given, although the companions of the deceased may not have heard it. But it seems to me impossible to deny that the evidence of persons, who, standing in a position where whistling must have been audible, say they heard none, was proper to be left to a jury on the issue whether there was whistling or not, however strong the affirmative evidence might be by which it was met; and the jurors in this case have found that issue in the negative.

If the deceased had been a mere trespasser on some part of the line where there was no crossing, it would have been entirely his own fault that he was in the way of danger; and as the Defendants would have been under no obligation to give any special warning of the approach of their trains to persons whose presence on their line they had no just cause to anticipate, the omission to give such notice by whistling, under these circumstances, would not have been negligence on their part.

But the jurymen have found (upon evidence to which I shall hereafter refer, and which in my opinion certainly justifies that part of their finding) that the company "held out to the public that persons accompanying intending passengers" (the deceased was such a person) "might cross and recross the railway" at the place where this accident happened, and that the deceased was at the time of the accident "lawfully using the line." Where there is a crossing so used, at a station where a train by which an intending passenger proposes to travel may stop, and where by the arrangements of the company another train not stopping there may also be appointed to pass through that station, from the oppo-

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site direction, about the same time, it appears to me to be the duty of the company to use proper and sufficient means to give warning of the approach of such other train; and if a person lawfully using the crossing is killed for want of such warning, his death is (in my opinion), *primâ facie* due to actionable negligence on the part of the company.

It is said that in this case there was a notice board with a warning of danger, and that the express train carried lights; and that the Judge ought to have ruled that the company was not bound to give any other or farther notice by whistling or otherwise. To this I cannot agree. The notice board had been put up long before, not to qualify by a special caution a permission to cross the line there, but for the opposite purpose of enforcing, by that special caution, a prohibition against crossing there at all. By a practice of above three years that prohibition had been waived, and the contrary usage had been established with the company's concurrence. I cannot, under these circumstances, think that a person aware of the subsequent practice, and acting upon it, was bound in his own mind to separate the caution from the prohibition, and to regard the former, though not the latter, as still addressed to him by the company. Lights might have been sufficient without more for those who could see them, but a person crossing (as the deceased did) behind the end of a train drawn up at the platform, might not, and probably would not, see lights in front of an express train advancing from the opposite direction till he was clear of the stopping train, when the express train might be close upon him. In such a state of things (as much as when there is a curve in the line) notice to the *ear*, if it is reasonably practicable, seems to be necessary. The evidence proves that on this line, and at this particular place, such notice was not only reasonably practicable but was usual. The engine-driver of the express train himself stated it to be his duty to whistle in passing every station, and wherever else he might think there was danger; and that he did so whenever he passed a level crossing. *Kavanagh*, the guard, added that it was the practice whenever an up train was stopping at this particular station to whistle a second time.

In this state of things I am of opinion that the Judge could not properly have withdrawn from the jury the question whether the

usual whistling was in this case omitted or not, and, if so, whether such omission was negligence on the part of the company, causing the accident.

With respect to the issue of contributory negligence, it was contended that the Judge ought to have held that the Plaintiff had failed to make a case proper to go to a jury, on the ground that there was proof of contributory negligence sufficient to neutralise the effect of the evidence given of negligence by the company. But I do not understand how, under such circumstances, the question of contributory negligence could cease to be one of fact for the jury. If, indeed, there had been no evidence at all given, except what necessarily went to shew that the negligence of the deceased himself was the cause of his death, a Judge might have been quite right in saying that there was no evidence in support of the Plaintiff's case to go to a jury. Such a case would have existed here, if it had been admitted that all proper warning was given by whistling or otherwise of the approach of the express train, and that the deceased, neglecting that warning, nevertheless persisted in crossing the line. But, as the present case actually stands, and upon the supposition (which has been affirmed by the verdict) that there was no whistling, the question of contributory negligence appears to me to have been one particularly fit to be submitted to a jury. I could not (on that supposition) say that the jurymen were drawing inferences which they were not entitled to draw from the evidence, if they thought that the deceased might have been put off his guard and induced to cross the line at the time and in the manner that he did, by the practice (on the one hand) of the company with respect to the use of this crossing for passengers alighting from, or going (with their friends) to meet trains stopping at the station, and by the omission (on the other hand) to give the usual notice by whistling of the approach of this particular express train.

The respect which I feel for the contrary opinions of some of your Lordships (which I have had the advantage of seeing), has induced me, after putting on paper (to the effect which I have already read) the impression left upon my mind at the close of the argument, again to go very carefully through the whole evidence given at the trial, and as my opinion still remains the same, I

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think it right to specify some parts of that evidence which it was, in my judgment, material for the jury to consider.

First, as to the crossing. Besides the strong and uncontradicted evidence of the Plaintiffs' witnesses as to its constant use in the presence of, and without objection by, the company's officers and servants, there are the statements of *Smith*, the company's own engineer, that "it was formed and brought up to the level of the railway, that passengers should cross and get out by the *Horse Shoe Gate;*" and of *Doyle*, the company's gate porter at *Haigh Avenue*, that "the *Horse Shoe Gate* was put there for the use of passengers, as an accommodation to them." The latter witness and *William Slattery* (a witness for the Plaintiff) agreed in describing the practice of the company to be for a porter to attend at the carriage doors of trains stopping at the *Lansdowne Station* to take their tickets from passengers desiring to go out by this crossing at the end or tail of the train, through the *Horse Shoe Gate*. And it was the custom (as already mentioned) to give notice by a second whistle of the approach of the down express train when any up train was stopping at the *Lansdowne Station*, in order (as the witness *Kavanagh* said) "to caution people in the second train," evidently because that use of the crossing, which was usual and encouraged by the company, would be dangerous without some such warning.

If the jury (believing that the usual whistling was on this occasion omitted) entertained the opinion that the deceased came by his death while using the crossing for a proper and legitimate purpose, and in a not unusual manner, I cannot say that there was no evidence on which such a conclusion could be founded.

The jury might reasonably infer from the whole evidence that the crossing in question was used, and was made for the express purpose of being used, by passengers, not only when leaving, but also when coming to such trains, without excepting night trains. The deceased (with two others) had accompanied his cousin, who was intending to travel to *Dublin* by the train then drawn up at the station. They had come in the usual way by the wire-path to the *Horse Shoe Gate*, and were only just in time to catch the up-train. The deceased crossed the line in advance of his companions and went towards the ticket-office, for the purpose (as the

jury might also reasonably infer) of procuring or bespeaking a ticket for his cousin. It is true that he crossed about forty yards in front of the up-train, while it was still in motion; but the company's witness, *John Doyle*, stated that this might be done without danger (as the train was "creeping up" slowly) unless he slipped. He returned at the tail of the same train as soon as it had stopped, first beckoning to his friends, and then advancing towards them. The jury might, I think, reasonably infer that he did so for the purpose of accelerating their movements and of saving his cousin from the loss of his train. All this (as it seems to me) would have been in the ordinary course of things if there had been then no down-train approaching; and it was not in the ordinary course of things that, under such circumstances, the down-train should approach that station without whistling.

But it is said that the deceased ought nevertheless to have been on the look-out for the lights of any approaching down-train; that it was impossible for him to have been run down but for his omission to do so; and therefore that the company cannot be liable for his death.

From this way of putting the case it seems to follow that, however proper and usual it may be for a company to give notice in a particular way of the approach of a train, where, without such notice there is a known danger, the omission to do so carries with it no responsibility; and that the case of any man who is run down is to be judged in the same way as if there had been no such usage, and no such obligation. Putting law (for a moment) aside, this does not seem to me to be sound reason. The circumstances under which that which is imputed as negligence to the deceased took place, ought, in my opinion, to be considered by a jury. In that opinion I am confirmed by the circumstances of this particular case, in which nothing is more noticeable than the extreme suddenness of the whole transaction.

From the evidence which I am about to mention, the jurymen were certainly entitled to infer that the deceased was moving forward at the moment when he first either saw, or, by looking up the line could possibly have seen, the lights of the down-train, and that it was then already so close to him as to make it very difficult, and perhaps impossible, for him to stop before it struck

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him. I do not think it would be consistent with that evidence to suppose that he could have gone forward after seeing those lights, under the idea of getting across before the express train came up.

His companions were more favourably placed than he was for the purpose of seeing and hearing the approaching train; and yet two of them (*John James Slattery* and *Farrelly*) said that they neither saw nor heard it till it was quite close upon them, and that, being themselves about to cross, they narrowly escaped the fate of their friend; the one being pulled back only just in time by *Darcy*, and the other seeing it when just at the *Dodder Bridge*. "The thing," he says, "was so quick." *Darcy*, the third of the party looked up the line, and "thought he saw something" at the distance of about 300 yards, but "was not quite sure," and "waited." It was not until it came to the *Dodder Bridge* that he "knew it by the rumbling," and "could see it quite plain." It travelled (according to *Rossiter*, who drove it) at the rate of twenty-eight to thirty miles an hour; and would, therefore, take not more than twenty seconds, or thereabouts, to run 300 yards. *Mulholland*, *Whelan*, and *Gallagher* (all servants of the company) said, in effect, that the up-train had hardly stopped when the express train went by; and the deceased, according to *Farrelly*, "re-appeared at the tail of the (up) train, coming down the slope which led from the platform on the south side to the crossing," at the moment when that train came to a standstill. *Darcy* said that when he first observed the express train, at about 300 yards distance, "deceased was on the opposite side, hid from view;" and added, "When I first saw the red light approaching, the deceased had not appeared at the tail of the train." *John James Slattery* said that "a person standing where the deceased was" (when he raised his hand and beckoned to them) "could not see a train approaching from *Dublin*, so long as the *Kingston* train remained in the position it then was." The space between the up and down tracks, according to the company's engineers, was 6 ft. 9 in. wide, leaving only 3 ft. 3 in. clear when two carriages were passing each other.

I should myself, if I were a juryman, have inferred from such evidence that the deceased first saw, and came in contact with, the express train at one and the same instant of time. And all

the facts which I have mentioned seem to me to have been proper and material to be submitted to and considered by a jury upon the issue of contributory negligence.

The cases of *Wanless* (1) and *Bridges* (2), in this House (with which that of *Jackson* (3) is consistent), determined, as I understand them, that a man is not necessarily to be regarded as having caused or contributed to his own death by getting out of a carriage, or by crossing a line of railway, in a manner *primâ facie* dangerous and imprudent (from which his death actually followed), if there is evidence of acts or omissions on the part of the company by which he might have been put off his guard and led to suppose that he might safely act as he did. In *Wanless's Case* the Lord Chancellor said of the boy who was killed (4): "It is quite clear he might have seen the other train; there is no doubt about that; but the result of this state of facts only comes to this, that being brought upon the line by the circumstance of the gate being open, he was placed in a position which was more or less embarrassing, and he did not use his faculties as clearly as he might have done under other circumstances." *Mutatis mutandis*, I should say the same here:—I am not satisfied that there was any ground in that case for saying, that the deceased was "invited" to cross the line, except in a sense in which a jury might be warranted by the evidence in holding that there was a similar "invitation" in this case also; and I even doubt whether the husband of the present Plaintiff, after he had once begun to recross the line, had equal opportunities with the sufferer in that case, of so using his faculties as to anticipate and avoid the danger.

I am, for these reasons, of opinion that the judgment of the Court below was right, on the only point which is open upon this appeal. I assent, however, not unwillingly, to the proposal of the noble and learned lord upon the woolsack that the appeal should be dismissed without costs.

LORD COLERIDGE:—

My Lords, this case is no doubt one of great practical importance. There will probably indeed not be found any difference in

(1) Law Rep. 7 H. L. 12.
(2) Law Rep. 7 H. L. 213.
(3) 3 App. Cas. 193.
(4) Law Rep. 7 H. L. at p. 16.

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the rules of procedure and principles of law, as stated or relied upon by any of your Lordships, who have considered and have given or are to give judgment in it. Yet it will be reported, and it is certain, as the arguments at your Lordships' bar have proved, that it will often be referred to in time to come, and that the facts of it will be elaborately described, in order to be likened to, or differed from, the facts of other cases on which arguments will arise, and in which it will be cited as an authority.

As to the facts of it, I have had the advantage of reading the opinion of my noble and learned friend upon the woolsack, in which they are so stated that I desire neither to add to nor to qualify his statement of them. Before, however, proceeding to discuss the questions of law which the facts raise I will make this only observation. Your Lordships, almost without exception, have expressed strong dissatisfaction with the verdict in this case, and have intimated that if it were open to you, as it is not, to set it aside as a verdict against the evidence you would readily do so. The noble and learned Lord upon the woolsack has spoken of the result of this litigation in language strong indeed, but I think not at all too strong for the facts, and which for myself I should desire to adopt. No doubt, that a verdict being very wrong does not shew that the jury ought not to have been asked for it; but if there are, as there are, classes of cases (such as those, *e.g.*, in which railway companies or infants are Defendants) in which juries are inclined to be guided rather by feeling than by law, it is very important in such cases that no fear of not properly respecting the functions of a jury as to matters within their province, should make a Judge hesitate to withdraw from the jury matters which are by law without it.

Two cardinal questions arise upon the facts of this case. 1. Was there any evidence to go to the jury of the Defendants' negligence? 2. Was the contributory negligence of the Plaintiff so proved, or admitted, that it became the duty of the Judge to direct a verdict for the Defendants? It is possible, I think that in one view of the case, this second question does not arise, at least as a separate question.

Now it is admitted that in order to justify a case being submitted to the jury, there must be evidence of negligence on the

part of the Defendants, and also that the negligence in fact caused the injury complained of. It was pointed out in the course of the argument, that, to the maintenance of such an action as this, it is as necessary to make out the latter proposition as the former, and, therefore, in order to submit a case to the jury there must be evidence of both. It is also clear that if the undisputed evidence, or the admissions in the case, negative the latter proposition, the Judge must withdraw the case from the jury, because the Plaintiff has not satisfied the onus which lies on him. It seems to me to be also clear, though I am perhaps not justified in saying that it is admitted, that this is the duty of the Judge none the less when the undisputed evidence, or the admissions which negative the fact that the Defendants' negligence caused the injury to the Plaintiff, point clearly to the fact that the injury was caused by the negligence of the Plaintiff, or of the deceased, himself. The Plaintiff fails if he fails to shew that the Defendants caused the wrong, and he does so fail, if he shews that he caused it, or that the deceased caused it himself.

There has been a difference in the form in which the defence arising from the negligence of the Plaintiff has been usually pleaded in actions of this sort in *Ireland* and in *England*. But the difference in form makes no difference in principle. The onus on the Plaintiff is the same in both countries, and the Plaintiff may fail in *Ireland* as well as here, to prove his cause of action, by proving his own negligence, as well as by not proving the negligence of the Defendant.

It is, therefore, I think the duty of the Judge to withdraw the case from the jury if by the Plaintiff's own evidence, at the end of the Plaintiff's case, or by the unanswered and undisputed evidence on both sides at the end of the whole case, it is proved, either that there was no negligence of the Defendants which caused the injury, or that there was negligence of the Plaintiff which did.

I will, in a moment, explain in what sense I use the general and vague words "evidence" and "proved"; but before doing so I observe that the general proposition, as it seems to follow from undisputed principles, so it is not without considerable authority to support it. The case of *Skelton* v. *London and North Western*

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Railway Company (1), seems to me a direct authority for the proposition that the question of the Plaintiff's negligence is to be considered by the Judge in deciding whether there is evidence of the liability of the Defendants to go to the jury. I gather from the report of that case (but my noble and learned friend, who tried it (2), will be able to say with certainty) that the Defendants gave evidence, and that his direction to nonsuit, which was upheld by the Court, was given after the whole of the case on both sides had been heard. I have since heard from my noble and learned friend that the Defendants gave no evidence; but it does not really affect the principle upon which the case was decided. But whichever way this fact was, the judgments of Lord Chief Justice *Bovill*, of Mr. Justice *Willes*, and Mr. Justice *Smith*, all either assume or lay down in terms the proposition I have stated. I think also, but with diffidence (because my noble and learned friend opposite [Lord *Blackburn*] who was a dissentient from the decision, intimated upon the argument a different opinion), that the case of *Wyatt* v. *Great Western Railway Company* (3) is also an authority that the Court is bound to consider the question of contributory negligence in deciding whether there is evidence to go to the jury of liability on the part of the Defendants. Mr. Justice *Willes* distinctly says so in *Skelton's Case* (4); and as *Wyatt's Case* (3) was upon demurrer to a declaration, and holding as it did the declaration bad, it must be taken, I presume, as an authority that if the facts stated in the declaration had been proved at *Nisi Prius*, the Judge would have been bound to nonsuit. Now the declaration stated negligence on the part of the Defendants, but stated also conduct on the part of the Plaintiff which the Court thought clearly the cause of the injury. I own this case seems to me to have been rightly construed by Mr. Justice *Willes;* if so, the case of *Skelton* v. *London and North Western Railway Company* (1) would not stand alone.

It is, however, no doubt necessary to explain in what sense I speak of evidence and proof; and here is the real difficulty in these cases, not so much in finding a form of words to express the legal rule, as in practically applying to particular cases the form

(1) Law Rep. 2 C. P. 631.
(2) Then Mr. Justice *Blackburn*.
(3) 6 B. & S. 709.
(4) Law Rep. 2 C. P. at p. 636.

of words when found. I mean by "evidence," and "proof," the unanswered statements of witnesses whose credibility neither side assails, and on the assumed truth of whose testimony both sides conduct the case. And if such evidence ought to shew to fair and reasonable men, either that the Defendants have not done or omitted anything which persons of reasonable case and skill would have done or omitted, or that the Plaintiff or the deceased has done or omitted something which a person of reasonable care or skill would not have done or omitted, it seems to be the duty of the Judge to stop the case and either to nonsuit or direct a verdict for the Defendants as the case may be.

I have used language which, or the equivalent of which, is to be found, I believe, in cases of undoubted authority—cases which have been described as giving rules for the guidance of Judges in the performance of their difficult duty. To me, the entire uselessness of such rules as practical guides lies in the inherent vagueness of the word "reasonable," the absolute impossibility of finding a definite standard, to be expressed in language, for the fairness and the reason of mankind, even of Judges. The reason and fairness of one man is manifestly no rule for the reason and fairness of another, and it is an awkward, but as far as I see, an inevitable consequence of the rule, that in every case where the decision of a Judge is overruled, who does or does not stop a case on the ground that there is, or is not, reasonable evidence for reasonable men, those who overrule him say, by implication, that in the case before them the Judge who is overruled is out of the pale of reasonable men.

The same is true of a whole Court, the decision of which, in a case of this sort, is reversed upon appeal. In this case, if your Lordships should hold that there was no reasonable evidence to be left to the jury, your Lordships' reason must differ from that of six eminent men whom you must hold in this particular case to have arrived at a conclusion not only mistaken, but unreasonable. And this might make one pause; but in the case so often referred to of *Jackson* v. *Metropolitan Railway Company* (1), your Lordships arrived without hesitation at this conclusion in respect of five Judges, of whom I was one; and I am therefore relieved from any difficulty,

(1) 3 App. Cas. 193.

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if the result of my opinion should be, that there was no reasonable evidence on which reasonable men ought to have found a verdict for the Plaintiff, and therefore that there was none which ought to have been submitted to a jury. It is indeed obvious that some such conclusion as this must always follow whenever the decision of a Judge is overruled which turns upon the question whether there was or was not evidence fit for a jury to consider.

Was there then such evidence in this case? I confess I think there was none. I need not state the evidence in detail. I should have been quite satisfied with the statement of facts given by the Lord Chancellor as to the negligence both of the Defendants and of the deceased. But since the preparation of these remarks I have seen the opinion of my noble and learned friend opposite (Lord *Blackburn*), with whose description of the conduct and utter negligence of the deceased man *Slattery* I entirely concur.

If it were necessary to decide the case simply on the absence of evidence of any negligence, causing injury, on the part of the Defendants, without regard to the conduct of the deceased, I should be prepared to hold that there is no such evidence. The only evidence suggested is the evidence that there was no whistling to give notice of the approach of the express train. I assume that there was no whistling (though in my opinion the fact was clearly otherwise), and even on that assumption, I think that the precautions taken by the Defendants, other than whistling, were sufficient; and farther, that the evidence for the Plaintiff clearly proved that the absence of whistling was not the cause of the accident.

Nor is it to be left out of sight that the accident happened at a spot on which, as it seems to me, the true effect of all the evidence is that the deceased was at his own risk. I do not indeed think that he was a trespasser in the sense that the company could have maintained an action against him for crossing the line at that spot. The conduct of the Defendants had been such that he must be taken to have been there, if not with their licence, at least with their acquiescence. But the proper crossing, the crossing which if he had used no accident would have happened, was elsewhere. He therefore took the crossing *cum periculo*, or, to use a favourite phrase of Lord *Campbell's*, *tale quale;* and I cannot see

that the Defendants in his case violated or neglected any duty which they owed to a man crossing the line at that spot as the deceased man did. This is not in my view an unimportant consideration in arriving at the conclusion that there was no evidence to go to the jury of any negligence on the part of the Defendants which caused the injury.

But it is not necessary to decide the case on this ground only. The true effect of the unanswered and unquestioned evidence as to the conduct of the deceased, is given in the reasons assigned by Mr. Justice *Keogh*, in the Court of Common Pleas (1), for his surely well-founded doubts, with a force and accuracy to which I can add nothing; and it seems to me to shew beyond controversy that the deceased was not only negligent but reckless, to shew that he was where he was, without any business, without any legitimate object, without any precautions; and to disprove that the Defendants caused his injury by proving clearly that he caused it and brought it on himself. This is not, I think, fairly to be described as inference from the evidence, and so for the jury; it is the very evidence itself unanswered and unquestioned.

I think, therefore, that this case should have been withdrawn from the jury, and that the Plaintiff should have been nonsuited, or if she refused her consent to a nonsuit, that a verdict should have been directed for the Defendants. I must advise your Lordships that the judgment of the Exchequer Chamber should be reversed.

LORD BLACKBURN:—

My Lords, this cause came on for trial before Chief Baron *Palles*. It appears from his report that, at the close of the Plaintiff's evidence, the Defendants' counsel applied for a nonsuit. The Chief Baron declined to nonsuit, but did not then reserve any leave to move. Evidence was then called for the defence, and on the close of the whole evidence, the Defendants' counsel called upon the Chief Baron to direct a verdict for the Defendants. The Chief Baron declined so to direct, but, with the consent of the Plaintiff, reserved liberty to the Defendants to move to have the verdict entered for them, if he ought so to have directed. Subject

(1) Ir. Rep. 8 Com. Law, 538, 539.

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to this reservation, he left the questions to the jury, who found for the Plaintiff, and the verdict was entered for her.

A conditional order was obtained in the Common Pleas to set aside this verdict, and to enter the verdict for the Defendants pursuant to this leave, or that there should be a new trial on the ground that the verdict was against the weight of evidence.

This order was discharged by the Court of Common Pleas, Justice *Morris* delivering the judgment, which was agreed to by Chief Justice *Monahan*—Justice *Keogh* stating that though he did not dissent from the judgment, he was not without the gravest doubts, and giving very powerful reasons for those doubts. There could not be any appeal on the question whether the verdict was against the weight of evidence, and that is not before your Lordships. But there was an appeal to the Exchequer Chamber as regarded the point reserved.

Three Judges, viz., Chief Baron *Palles*, Baron *Fitzgerald*, and Baron *Dowse*, were of opinion that the order of the Court of Common Pleas was right, and ought to be affirmed; three, viz., Chief Justice *Whiteside*, Baron *Deasy*, and Justice *Barry*, were of opinion that it was wrong, and that the verdict for the Plaintiff ought to be set aside, and a verdict entered for the Defendants. The Court being equally divided, the order was affirmed, and the the appeal to your Lordships is from that affirmance.

I need hardly say that where there is so great a diversity in the opinions below, the case requires to be carefully considered, and the reasons of the different Judges to be carefully weighed.

The case was argued on a former occasion at the Bar of your Lordships' House. I then came to the conclusion that the order should be reversed and the verdict entered for the Defendants, but in consequence of a difference of opinion amongst the noble and learned Lords who then heard the argument, it has been re-argued, and the majority of the noble and learned Lords who for the first time heard the argument then, entertain a different opinion from that which I formed. I need hardly say this makes me diffident. I have carefully read the opinions of all the noble and learned Lords, and have re-considered my opinion, but have not been able to change it.

I quite agree that the duty and power of a Judge who presides

at a trial by jury is not to find the facts. It is confined to giving the proper direction in point of law. Where there is no dispute between the parties as to the truth of any particular fact, or the accuracy of any particular witness, there is no need to ask the opinion of the jury on that. For "the jury is not to inquire as to that which is agreed on by the parties" (1). If there is some farther inference of fact which may be drawn from the undisputed facts, it is still for the jurymen to say whether they will draw that inference. It is for the Judge to say whether they can draw it. An absence of dispute may, in my opinion, be shewn not only by an express and formal admission, but also by such a conduct of the cause as is equivalent to such an admission. But with this exception it is the province of the jury to find the facts. The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him, unless there is an express or tacit admission that the whole of his account is to be taken as accurate. And therefore, as a general rule, no Judge can give an absolute direction to the jury to find a fact either way. He can only give it conditionally. "If you believe the evidence given by these witnesses, the law is such that you must find it." And here it is of great importance to see on whom the onus of proof lies; for if the state of the case is such that on the admissions on the record, and the undisputed facts given in evidence on the trial, the onus lies on either side, the Judge ought to give the direction, first that if there are no additional facts to alter this, the jury ought to find against that party on whom the onus now lies. And (according to what the state of the evidence is) he should either direct the jurors that if they believe the witnesses, there is reasonable evidence on which they may properly find facts, and draw inferences, such that they may find for the party against whom the onus lies; or that, even though they believe the whole of what is sworn to, there is no evidence on which they can properly find the question for that party on whom the onus of proof lies, and, therefore, to direct them to find the verdict against that

(1) Roll. Abr. 691, Trial R. 1, and the authorities there cited.

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party. His direction either way is subject to review. I quite agree that it is not enough that the balance of testimony should be overwhelmingly on one side, and that therefore a verdict the other way ought to be set aside as unsatisfactory. To justify a direction to find a verdict the onus must be one way, and no reasonable evidence to rebut it.

Lord Blackburn.

My Lords, I think the recent decision of your Lordships' House in *Metropolitan Railway Company* v. *Jackson* (1) conclusively establishes this doctrine in cases in which the onus was on the issue, as joined on the record, on the party against whom the verdict was directed. I am of opinion that it is equally so when a fact found, or undisputed at the trial, has shifted that onus; but as that is, I think, controverted by my noble and learned friend on my left (Lord *Penzance*), I shall mention authorities which I think support my position.

In *Polhill* v. *Walter* (2) the Plaintiff in his second count alleged that the defendant falsely and deceitfully represented that he was authorized by one *Hancorne* to accept on his behalf a bill drawn on *Hancorne*, and so induced the Plaintiff to take the bill as accepted. To this the old general issue was pleaded. There could not be imagined an issue more clearly lying on the Plaintiff.

Lord *Tenterden* in delivering judgment says (3): "On the trial it appeared that when the bill was presented for acceptance by a person named *Armfield*, who was one of the payees of the bill, *Hancorne* was absent, and that the Defendant, who lived in the same house with him, was induced to write on the bill an acceptance as by the procuration of *Hancorne*, *Armfield* assuring him that the bill was perfectly regular, and the Defendant fully believing that the acceptance would be sanctioned, and the bill paid at maturity, by the drawee. It was afterwards passed into the Plaintiff's hands, and being dishonoured when due, an action was brought against *Hancorne*. The Defendant was called as a witness on the trial of that action, and he negativing any authority from *Hancorne*, the Plaintiff was nonsuited. I left to the jury the question of deceit and fraud in the Defendant, *as a question of fact on the evidence*, and the jury having negatived all fraud, the

(1) 3 App Cas. 193. (2) 3 B. & Ad. 114.
(3) 3 B. & Ad.. at p. 121.

Defendant had a verdict, liberty being reserved to the Plaintiff to move to enter the verdict if the Court should think the action maintainable."

Lord *Tenterden* afterwards says (1): "If, then, the Defendant, when he wrote the acceptance, and thereby, in substance, represented that he had authority from the drawee to make it, knew that he had no such authority (and *upon the evidence* there can be no doubt that he did), the representation was untrue to his knowledge, and we think that an action will lie against him by the Plaintiff for the damage sustained in consequence." And the rule was made absolute to enter the verdict for the Plaintiff. I cite this case because the decision involves in it two positions: first, that the evidence (consisting, apparently, of proof of what the Defendant had sworn when a witness on the other trial) was, by the course taken on the trial, admitted to be true, so far that the Defendant's knowledge of his want of authority was not in dispute; and, secondly, that this being not in dispute, there was no occasion to leave to the jury anything on that, but that the Judge ought to direct the jurors to find the verdict for the Plaintiff on that undisputed fact, without asking any question of them, though that verdict which the jurors were directed to find was one of fraud in the Defendant, of which the onus certainly at the beginning of the trial lay on the Plaintiff. Both positions seem to me clearly right. I cite the case because I think the decision could not have been come to unless the Court of King's Bench (consisting at that time of Judges of the very highest reputation) had affirmed both positions.

The cases in which the principle that the onus may shift from time to time has been most frequently applied, are those of bills of exchange. At the beginning of a trial, under the old system of pleading, all was put in issue by the general issue. Under that system of pleading the onus was on the Plaintiff to prove that he was holder, and that the Defendant signed the bill. If he proved that, the onus was on the Defendant, for the bill imports consideration. If the Defendant proved that the bill was stolen, or that there was fraud, the onus was shifted, and the Plaintiff had to prove that he gave value for it. This, as is

(1) 3 B. & Ad. at p. 124.

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pointed out in the judgment in *Smith* v. *Braine* (1), depends not on the allegation, under the new system, on the record, that there was fraud, but on the proof of it at the trial. In *Harvey* v. *Towers* (2) the action was by an indorsee from the drawer against the acceptor of a bill. The plea was that the acceptance of the bill was obtained from the Defendant by the drawer and others, in collusion with him, by fraud, and that there never was value from the Plaintiff for the indorsement, and that the Plaintiff held the bill without value. Replication *de injuriâ*. On the trial the Defendant's counsel began and gave evidence of fraud on the part of the drawer; the counsel submitted that this threw the onus on the Plaintiff to prove consideration. The learned Judge (Baron *Martin*) was of opinion that even if fraud had been established, the Plaintiff was not bound to prove consideration, inasmuch as the affirmative of the issue was on the Defendant. The Plaintiff's counsel, in consequence, declined to give evidence of consideration; the jury found that the bill was obtained from the Defendant by fraud on the part of the drawer. The learned Judge thereupon, conformably to the opinion he had expressed, directed a verdict for the Plaintiff, reserving leave to the Defendant to enter a verdict on the plea of fraud. The verdict for the Plaintiff was set aside, on the express ground that proof of the fraud shifted the onus of proof. There the fact was in dispute, and was left as a separate question to the jury, and was so found; but I apprehend the result would have been the same if the Plaintiff's counsel had admitted that the evidence shewed that the drawer was guilty of fraud, to which the Plaintiff was no party, and in consequence of that admission no question had been asked of the jury.

When, as in the present case, there is doubt as to what the proper direction in law is, the Judge ought, as far as practicable, to put the case in a proper train for having the verdict entered without any new trial, according to what the law may ultimately be ascertained to be. Down to the beginning of the seventeenth century this could only be done by finding a special verdict; and unfortunately there was so much technical nicety required in framing a special verdict, that it required great skill, and some

(1) 16 Q. B. 244. (2) 6 Ex. 656.

good fortune, to be able to raise the real question on it. At the time I have mentioned a practice began of the Court in banc, during the first four days in term, whilst the case was yet in the paper, of granting, in the discretion of the Judges, a new trial if there appeared to have been any miscarriage on the trial. This was found so very convenient, that what at first was only an exercise of the equitable discretion of the Courts, became a recognised system of law, and it became usual for the Judge to give the direction which in his opinion at the trial was the right one, reserving leave to enter the verdict according to what he ought to have directed. This superseded special verdicts where it was not intended to carry the case beyond the Court in Banc, and on these reservations the Court in banc did not require the same technical precision which had unfortunately become requisite on a special verdict. It looked to the trial to see what was really in dispute, and what the real point was; but till a comparatively recent period the decision of the Court of first instance was final. Now, such a reservation may be taken, as this has been, into a Court of Appeal, and I think if the reservations are treated by the Courts of Appeal, not as special verdicts used to be, having regard to technicalities, but, as justice would seem to require, having regard to the substance of what really took place and was agreed on at the trial, special verdicts will fall into disuse altogether. A jury, no doubt, has the physical power to find a verdict contrary to the direction of the Judge, but if that is done it is wrong. And when leave is reserved to enter a verdict according to what is ultimately determined to be the proper direction in law, it is on the supposition that the jurors do their duty and follow that direction. The Plaintiff in this case may, I am afraid, not without some grounds, think that she being a widow with orphans, and the Defendants a railway company, she had a chance that jury after jury would find for her, whatever were the directions given, and that she has lost that advantage. But it is one which she ought not to have if the proper direction should have been that the jurymen, if they did their duty, could only find for the Defendants.

What direction the Judge should give must depend, first, upon what the nature of the controversy on the trial is. It does not, in my opinion, make any difference in the duty, either of the

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Judge or the jury, in deciding that controversy, whether it is raised by one form of pleading or by another. The pleadings are very material in ascertaining what the controversy is; they are immaterial in determining how that controversy is to be disposed of.

The next matter on which the propriety of the direction depends, must be what was the state of the facts and evidence at the time the direction was given.

I think that there is in this case no room for doubt as to what the controversy at the trial was. It was a case of a collision, and in such cases the principles of law have, as far as I know, always uniformly been agreed upon, though there often has been a great difference of opinion as to the application of those principles to the particular case. Those who go personally or bring property where they know that they or it may come in collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such a collision. In the judgment of Chief Baron *Palles*, and on the argument at your Lordships' bar, several cases were cited, such as *Corby* v. *Hill* (1), where the duty cast on the party by law depends on a different principle. I do not think it necessary to examine these cases. In cases of collision, the principle is, I think, what I have above stated. And the duty in such cases is reciprocal. With two carriages on two ships of equal weight, the risk of damage if they come into collision with each other, is about equal, and the reciprocity of duty is obvious. Where a light gig comes in collision with a heavy waggon, the damage is likely to fall principally on the light gig, and if a man comes negligently in collision with an express train, he will almost certainly be dashed to pieces, whilst those in the express train will very likely be unconscious that any accident has happened. There is a natural feeling in juries in favour of the light gig or the man, who will suffer the chief damage; but the duty cast by law on the light gig or man is the same as that cast on the heavy vehicle, viz., to use reasonable care and skill to avoid the collision.

But there arises a farther question. It may well be that both parties are guilty of a neglect of duty, and that if either had used

(1) 4 C. B. (N.S) 567.

reasonable care and skill the collision would have been avoided. In such a case the maritime law, which is followed in the Admiralty, apportions the joint damage. But by the common law, which is what we have now to administer, the damage lies where it falls, and the Plaintiff who is himself to blame cannot recover though the Defendant may also be to blame. It is not for us now to inquire which of the rules is the more just or expedient. The received and usual way of directing a jury as to this, is to say, that if the Plaintiff could, by the exercise of such care and skill as he was bound to exercise, have avoided the consequence of the Defendants' negligence he cannot recover. I am inclined to agree with Justice *Barry's* criticism, and say, this is not logically precise; but in the great majority of cases in practice it is quite reasonable, and in the present case it is, I think, a sufficient guide. The controversy at the trial then, in this case, was whether this accident was the result of neglect of duty on the part of the Defendants, and not of neglect of duty on the part of the deceased.

The evidence shewed, beyond any controversy, that though the railway company had put up a notice forbidding persons to cross at the place in question, yet for three years persons had been in the practice of crossing there, and that the company and the company's servants must have been aware that persons were likely to be crossing there. That, I think, was all that was necessary to cast the duty on the railway company to use reasonable care and skill to prevent a collision with such persons.

And though I think there is no ground for saying that the deceased knew that the express train from *Dublin* was then due, yet it was beyond all controversy that he knew that the line was in full working order, and that trains might be passing at any time. That was enough to cast the duty on the deceased, if he chose to cross, to take reasonable precautions to avoid a collision with such a train.

And inasmuch as railway trains travel with great speed, and cannot be either stopped or turned at a moment's notice, the precautions on the part of the company must consist in doing what is sufficient to warn persons that a train is coming, whilst it is so far off that a person cannot yet have come on the line, or got into

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a position of danger; and the precautions to be taken by the person crossing must be directed to ascertaining before he begins to cross that there is no train so near as to make his crossing dangerous.

Three witnesses, and only three, saw the accident. They were all called for the Plaintiff, and all three gave the same account of the accident. They all said that they heard no whistle from the down train as it passed. I agree that such evidence from persons who were in a place where, if a whistle was sounded, it must have been heard, is reasonable evidence that it was not sounded. I think, under such circumstances as the present, it was not of much weight, for the witnesses who saw such a terrible accident and narrowly escaped from death themselves, were likely to have their whole attention concentrated on what they saw, and might perhaps not hear, or more probably would not recollect hearing, the whistle, however loudly it was sounded. But the weight of the evidence was for the jury, not for the Judge. The Defendants' evidence was extremely strong that there was a whistle. The jury chose to disbelieve the Defendants' witnesses; or I think more probably, though believing them, chose to find for the widow and orphans against the railway company. I think such a verdict was most unsatisfactory; but, at least at the time when this action was tried, there could be no appeal on that ground.

The witnesses called for the defence gave evidence from which I think the jury might conclude that those who had the management of the Defendants' trains always whistled, and were directed by their employers always to whistle, when about to pass a station or a level crossing. In no other respect was the case, as made by the Plaintiff, contradicted or added to on the part of the Defendants.

This brings us to the question which is, I think, that on which the decision of the case depends, viz., whether the state of the evidence and of the admitted facts on the trial was such as to make it proper to direct the jury to find for the Defendants.

It was laid down in *Ryder* v. *Wombwell* (1) that "there is in every case a preliminary question, which is one of law, viz., whether there is any evidence on which the jury could properly

(1) Law Rep. 4 Ex. 32.

find the question for the party on whom the onus of proof lies; if there is not, the Judge ought to withdraw the question from the jury, and direct a nonsuit if the onus is on the Plaintiff, or direct a verdict for the Plaintiff if the onus is on the Defendant," and this was approved of and adopted in this House in the recent case of *Metropolitan Railway Company* v. *Jackson* (1). I have already given my reasons for thinking that the expression—"the party on whom the onus of proof lies," must mean, not the party on whom it lay at the beginning of the trial, but the party on whom, on the undisputed facts, it lay at the time the direction was given.

If in the present case no evidence at all had been given to shew that there was neglect of duty in the deceased occasioning the accident, no doubt it must have been taken that there was no such neglect of duty. So far the onus was at the beginning of the trial on the Defendants. And it therefore becomes necessary to inquire what difference that makes. I think it does make the difference which is pointed out by Chief Justice *Cockburn* in *Ellis* v. *Great Western Railway Company* (2). If the facts, on which the duty of the Plaintiff would arise, are disputed, it is quite possible that a jury may disbelieve the evidence which tends to prove those facts. If, for example, in the present case, the Plaintiff's counsel had questioned the accuracy of that part of the evidence, of his own witnesses, that went to shew that the approaching train was visible to any one who looked up the line, I think the Judge could not have simply directed the jury to find for the Defendants. His direction could only have been conditional: "If you believe that part of the evidence." And it may often be prudent in the Defendant's counsel to make sure at the trial that no such point as this should be raised hereafter, by asking the Judge to take an admission that there is no controversy on that part of the case, or, if that admission be refused, to take the opinion of the jury specially upon the fact. But in the present case it is obvious that there was no such controversy, and if it were said that the verdict for the Plaintiffs must stand, because no formal admission of this was asked for and obtained, we should introduce, into a point reserved, the technicalities requisite in a special verdict, founded on the old doctrine that even a

(1) 3 App. Cas. 193, at p. 207. (2) Law Rep. 9 C. P. 557.

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scintilla of evidence must be left to the jury. But if the found or admitted fact is such as to shift the burthen of proof, I cannot think that it matters that the burthen of proof originally lay on the other side. And that brings me to the questions on which I think the decision of this case really depends:—1st. Can there be a case in which an admitted fact so clearly shews a *primâ facie* want of reasonable care on the part of the Plaintiff causing the accident that the Judge ought to rule that unless there was proof of something to excuse or justify it, the jury ought to find for the Defendant? 2nd. Whether the present is such a case.

As to the first of these questions, Lord Justice *Brett*, in delivering his opinion to this House in *Bridges* v. *North London Railway Company* (1), says: "The Judge, therefore, before directing the jury on the terms above set forth, first determines the following questions:—Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the Plaintiff had been injured by some act of commission or omission by the Defendants or their servants? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that any such act of commission or omission was such, as a person of reasonable care and skill under such circumstances would have done, or omitted to do? Are there facts in evidence upon which, if unanswered, men of ordinary reason and fairness might fairly say that the Plaintiff had not, in a manner contributing to the accident, done anything, or omitted to do anything, which a person of ordinary skill under the same circumstances, would not have done or would have done? . . . If the Judge, not deciding the final issues according to his own individual view, but determining according to the propositions last laid down, holds that there is no evidence fit to be left to the jury on some one of the cardinal questions before stated, he must direct the jury as a matter of law that there is no case in favour of the Plaintiff, or he must nonsuit the Plaintiff."

This certainly shews that the learned Judge thought that, in a proper case, the Judge could withdraw the case from the jury on the last of the three propositions he above lays down. Eight out of the nine Judges in the Court below expressly say that in

(1) Law Rep. 7 H. L. at p. 233.

their opinion it might be done, and Baron *Fitzgerald*, though he does not say that he agrees with them, does not, at least expressly, dissent.

My Lords, I quite agree that abstract propositions stated by learned Judges, where they do not form the ground of the decision, though of weight as legal opinions, are not of the same weight as where the propositions are laid down as the ground of a decision. They are not so carefully considered; nor are the necessary qualifications always expressed. And the Attorney-General for *Ireland*, in his able argument at your Lordships' Bar, when this case was first argued, said that he could not find any case in which the decision had been that the Judge might direct a verdict on the ground of the Plaintiff's want of reasonable care.

I think that *Skelton* v. *London and North Western Railway Company* (1) is such a case. There Lord Chief Justice *Bovill* says (2): "If the crossing was rendered dangerous by obstructions to the view, it only made it more incumbent on him to take due care, There is no evidence, however, that the deceased took any care or caution whatever; when he reached the first line of rails he could have seen 300 yards, but it appears from the evidence that he did not look either to the right or left, but walked heedlessly on, and it was owing to this want of caution on his part that the accident occurred."

Mr. Justice *Willes* says (3): "I am of the same opinion. I think that the evidence shews that if the deceased had looked out he might have stopped in time and saved himself; and the case of *Wyatt* v. *Great Western Railway Company* (4) shews that the Court is bound, in such cases as the present, to consider the question of contributory negligence in deciding whether there is any evidence to go to the jury of liability on the part of the Defendants. I should be prepared, therefore, to decide this case on the grounds stated by my Lord, had I not a still clearer opinion on the other part of the case."

My Lords, I doubt whether the decision in *Wyatt* v. *Great Western Railway Company* (4), which was on a demurrer, sup-

(1) Law Rep. 2 C. P. 631.
(2) Law Rep. 2 C. P. at p. 635.
(3) Law Rep. 2 P. C. at p. 636.
(4) 6 B. & S. 709; 34 L. J. (Q.B.) 204.

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ports the doctrine for which it is cited, and if I am right in that, it *pro tanto* diminishes the weight which belongs to every opinion of that very learned Judge Mr. Justice *Willes*.

Mr. Justice *Montague Smith* after stating the facts as to the gate says (1) "That was not sufficient to absolve a foot-passenger from the duty of taking the ordinary care which he would otherwise have been bound to do, and it was the want of such care on the part of the deceased that occasioned his death, and not any default on the part of the Defendants." Perhaps *Ellis* v. *Great Western Railway Company* (2) is not such an authority as the Attorney-General asked for, as it may be that the majority of the Court there acted on the absence of evidence of neglect of duty on the part of the Defendants producing the accident, though Mr. Justice *Mellor* seems to put it on the other ground. With that exception, if it be one, none of the cases cited nor any cases which I have found, except that of *Skelton* v. *London and North Western Railway Company* (3), are cases in which the doctrine has been acted on. But there is no case that I can find opposed to the doctrine, and it seems to me clearly right on principle.

My Lords, I assume in what I am about to say that the finding of the jury, that there was not any whistling on the part of the express train, (though I think very much against the weight of evidence,) is binding. I had, and still have, some doubts whether as it appears on the evidence that the night was clear, and that the train had its lamps lighted, and was visible, and was in fact seen at quite a sufficient distance, the Judge was not bound to say that the Defendants had fulfilled the duty cast upon them by law, and done enough without whistling, and that if they had done enough they were not liable because they might have done more. But I think that if the result of the experience of those who have the practical management of trains is such as to make a particular precaution ordinary and general, it may well be said that a person taking reasonable care would use that precaution. I think therefore that I cannot say that the Judge ought to have directed the jury that they could not find a want of reasonable care on the part of the Defendants.

(1) Law Rep. 2 C. P. at p. 637. (2) Law Rep. 9 C. P. 551.
(3) Law Rep. 2 C. P. 631.

But it seems to me that the proper direction of the Judge on the rest of the case ought to have been that, from the course taken by the counsel, the jury might take the account given by the three witnesses as correct, and that it was for the jury to draw from it such inferences of fact as might legitimately be drawn; that if the jurors thought, as perhaps they might, that the deceased did look and see the approaching train, and thought that he might cross in safety before the train travelling at full speed, as he had previously done before the up train, which was coming to a standstill, then they must find for the Defendants; for on that supposition, as the whistle would have done no more than tell him that a train was coming, the neglect to whistle was in no way the cause of the accident. But if they thought, as seems the only other alternative, and the more reasonable one, that the deceased crossed the line without looking to see whether a train was coming, I think the Judge should have told them, as a matter of law, that was such negligence as cast on the Plaintiff the burden of proving that there was something to excuse the failure in the deceased to take that precaution; or that he took some other sufficient precautions. I do not say that there may not be circumstances which would excuse him from looking, and if there is evidence of such circumstances that may satisfy the onus cast upon him by the admitted fact that if he had looked he would have seen. To take an extreme case, we may suppose a station-master saying to a passenger "Cross the line now, for now it is safe; it may soon cease to be so." I am far from saying that there would be any want of reasonable care in the passenger if he acted on this without looking out for himself; and I think that it would scarcely lie in the mouth of the railway company, the masters of that station-master, to set up that it was want of reasonable care. *Wanless* v. *North Eastern Railway Company* (1), so much relied on by the Plaintiff's counsel, was not so strong and clear a case as I have supposed, but it was similar in kind. The gates being open, by the default of the company, was an invitation to cross then; and that circumstance was the *ratio decidendi* of your Lordships' House; but what I do say is, that in the present case there is no evidence of anything to excuse the deceased from

(1) Law Rep. 7 H. L. 12.

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taking this precaution, and no evidence that he took any other precaution at all.

The statement of the witness *Slattery*, as far as regards the happening of the accident, is in these terms: "I saw my cousin pass through the *Horse Shoe Gate*, and pass across the line; he reached the opposite platform. I then observed the train coming up from *Kingstown* on my left; it was about forty yards from my cousin. When he reached the platform on the other side he proceeded towards the ticket office; we came up to the *Horse Shoe Gate* and got out on the line. The train from *Kingstown* got between me and my cousin, and excluded him from our view; it moved towards the station, and, as the end of the train came opposite us, the down train dashed past us; the up train was just at a standstill when the down train dashed up; I saw my cousin's figure on the other side, just at the *Kingstown* end of the up train; he raised his hand as if beckoning us to him; I was about to advance to my cousin when Mr. *Darcy* caught me by the arm and drew me back, and the down train dashed past; I heard no whistle; after deceased beckoned he advanced towards us, and as he did so the down train caught him in the centre of the track; I saw his body afterwards nine yards from the turnstile in the *Kingstown* direction. The ticket office is on the south side; to get a ticket a person at the *Horse Shoe Gate* should cross the line; when deceased crossed the line towards us, the train to *Dublin* was at a standstill; a person standing where deceased was could not see a train approaching from *Dublin* so long as the *Kingstown* train remained in the position it then was." And the other two witnesses who saw the accident give the same account.

No doubt whilst the up train stood where it did the deceased, standing on the platform, could not see the approaching down train, but I cannot think that this furnished reasonable evidence, or, indeed, any evidence, of an invitation on the part of the company to the deceased to cross the line at that time without farther precaution. They took no steps to hinder his crossing, and may perhaps be said to have permitted his crossing, but that seems to me all. Even if the train had stopped long enough to let the passengers get out, I doubt if it could properly be said that the practice of the station invited persons then to cross at this spot,

unless they were warned by the porter who took the tickets, to keep back. Perhaps it might be so said, but the evidence is that that time had not come. The up train was just at a standstill.

Neither do I think that there is evidence that the deceased heard no whistle, and that he took a reasonable precaution when he listened and heard none, and so thought that no train was coming.

Even if the evidence had been that he stopped and apparently listened, and heard nothing, I should say that was by no means a reasonable precaution. But the evidence is all the other way. There does not seem to me to be even a scintilla of evidence that he took this very insufficient precaution.

I make these statements with due diffidence, because an opposite view on both points is taken by some of the noble and learned Lords who have spoken; but such is the opinion I entertain, and I am bound to state it.

My Lords, if it is said that we encroach on the province of the jury by saying that not to look along the line before crossing it is a circumstance that, unanswered, shews want of reasonable care, I can only answer by citing the language of the judgment in *Ryder* v. *Wombwell* (1), which I think is sound law, and which *mutatis mutandis* I think applicable to the present case. It is there said (2): "We quite agree that the Judges are not to determine facts, and therefore where evidence is given as to any facts the jury must determine whether they believe it or not. But the Judges do know, as much as juries, what is the usual and normal state of things, and consequently whether any article is of such a description as that it may be a necessary under such usual state of things. If a state of things exist, (as it well may,) so new or so exceptional, that the Judges do not know of it, that may be proved as a fact, and thus it will be for the jury, under a proper direction, to decide the case. But it seems to us that if we were to say that, in every case, the jury are to be at liberty to find anything to be a necessary on the ground that there may be some usage of society, not proved in evidence, and not known to the Court, but which it is suggested that the jury may know, we should in effect say that

(1) Law Rep. 4 Ex. 32. (2) Law Rep. 4 Ex. at p. 40.

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the question for the jury was whether it was shabby in the Defendant to plead infancy."

My Lords, it seems to me if we were to say that Judges cannot know that it is rash to cross a railway on foot, on which it was known that trains were running, without taking some precaution to ascertain that no train was coming; and therefore that a Judge cannot rule that in the absence of evidence of something to excuse it, the person so crossing cannot recover for a collision; we should in effect say that the question for the jury was whether it was not shabby in the railway company not to give something to the widow and orphans of the deceased. I fear too often that is the question really considered by the jury; but I think it clear it ought not to be so.

My Lords, in order to avoid all chance of misapprehension hereafter, I think it better to repeat that I do not think that the cogency or strength of the evidence in support of a disputed fact justifies the Judge in directing the jury to find it. But I think that when there is an admission, either express or by the conduct of the cause, of a fact, the Judge is not only entitled, but bound to direct the jury to act upon that admission.

LORD GORDON:—

My Lords, I concur in the judgments which have been delivered by the majority of your Lordships, and consider it unnecessary to say anything farther in amplification of the views which have been already so fully and clearly explained. I content myself with stating briefly the results of the opinion I have formed after full consideration of the arguments and issues which I have read or heard.

There were two issues to be tried in the case:—1st. Whether there was negligence on the part of the Defendants; and 2ndly, Whether there was negligence on the part of the deceased contributing to the fatal occurrence which happened. There was abundant evidence led on the first point, particularly in regard to whistling; and if the case had stood on the first issue alone, I understand that none of your Lordships doubt that it would have been right to leave that evidence, as was done, to the jury. I think the weight of the evidence was on the side of the Defendants, and that the jury should have so found; but the jurors

were the proper arbitrators, and were entitled to decide the point before them as they did.

But it is said the position of the case is altered by the second issue, and that there was evidence led on the part of the Plaintiff herself which shewed that the deceased had contributed to the accident by his own negligence in crossing the line without looking to see whether it was clear, and that, on that evidence, the Judge should have withdrawn the case from the jury and directed a nonsuit. Now I am unable to concur in that view. The second issue was, like the first, a question of fact, and there was evidence led in regard to it. I think the evidence pointed pretty conclusively in one direction, but I think the jurors were the proper persons to deal with the evidence in regard to this issue, as they were in regard to the first, and that the Judge at the trial rightly left the issue to the decision of the jury. I think a case of disputed facts ought not to be withdrawn from a jury merely because the evidence seems to the Judge to point all in one direction. Whether the evidence be strong, or conflicting, or weak, it is equally the province of a jury to decide upon it; and I think a presiding Judge would be arrogating to himself functions not belonging to him if he were, on the trial of a question of fact, to withdraw the evidence from the jury, and to decide on it himself.

Where there is *no* evidence to go to the jury it is proper for the Judge to direct a nonsuit. That was the course which this House considered ought to have been followed in the recent case of *Metropolitan Railway Company* v. *Jackson* (1). But in my view this case is very different from the case of *Jackson*. I think there was evidence in this case on both the points raised, and that the Judge did right in leaving the case to the jury.

Order appealed from affirmed, and appeal dismissed without costs.

Lords' Journals, 31st July, 1878.

Solicitors for the Appellant: *Holmes, Anton, & Greig.*
Solicitors for the Respondent: *Kynaston & Gasquet.*

(1) 3 App. Cas. 193.

[HOUSE OF LORDS.]

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May 14, 16, 17, 20, 21, 23, 24, 27; *July* 25, 26, 29, 31.

EMILE ERLANGER AND OTHERS . . . APPELLANTS;

AND

THE NEW SOMBRERO PHOSPHATE COMPANY AND OTHERS . . . . . } RESPONDENTS.

Company—Promoters—Fiduciary Position—Concealment of Material Facts.

11 Ch D. 709
4 CPD 464
407
5 QBD 109
14 Ch D 393
16 Ch D. 684
17 Ch D 126
— 308
— 471-6.
WMS 4/82

Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it.

A "syndicate" (or partnership) of persons, of which one *E.* was at the head, purchased from the official liquidator of an insolvent company an island said to contain valuable mines of phosphates. *E.*, who managed the business of this purchase, prepared to get up a company to take over the island and to work the mines. He named five persons as directors. Two were abroad. Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appeared to have acted as a business agent for *E.*; the other was a private friend of *E.* The sale of the island was made, nominally, by a person who had really no interest in the island, and was made to the director who was the business agent of *E.*, and who appeared as the purchaser for the company. The two directors, with whom, through *E.*'s arrangement, a third person, *D.* (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted, on its behalf, the purchase. A prospectus was issued, giving a very favourable account of the scheme. Many persons took shares. At the first meeting of shareholders, *D.* took the chair as a director. Being questioned by a shareholder as to certain rumours relating to the purchase of the island and its price, on the first sale, and then on its resale to the company, *D.* avowed his want of knowledge, but declared his belief in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February, 1872. In June, 1872, there was a general meeting of the shareholders. The rumours before referred to had become stronger, and a committee of investigation was appointed; on the receipt of whose report in August, 1872, the original directors were, at a public meeting, removed, and a new set of directors appointed, with power to take measures, &c., for the benefit of the company. The new directors entered into a correspondence with the vendors of the island, which termi-

nated in nothing, and a bill was, in December, 1872, filed to rescind the contract:—

Held, that the contract could not be sustained, but

Dub. THE LORD CHANCELLOR (Lord *Cairns*), whether there had not been, on the part of the company, such delay in coming for relief as to constitute laches that deprived the company of the title to obtain it.

Observations on the duty of promoters of a company.

THIS was an appeal against a decision of the Court of Appeal which had reversed a decree of Vice-Chancellor *Malins* (1).

Sombrero is a small island in the *West Indies*, which was the property of the Crown, but had been leased out by the Crown for twenty-one years from March, 1865, at a rent of £1000 a year. The lease had been assigned to a company called "*The Sombrero Company*," the business of which was to work the beds of phosphate of lime with which the island abounded. The company got into difficulties, and was ordered to be wound up; and the lease, constituting the most valuable part of the assets, was ordered to be sold. Mr. *Chatteris* was the official liquidator, and he fixed the price of £55,000 for it. The Appellants, together with one *Thomas Westall*, formed what was called a syndicate (in this instance meaning a special partnership), for the purpose of purchasing it. It was purchased at the price put on it by Mr. *Chatteris*, after the syndicate had offered, but in vain, a smaller price for it. The purchase was effected by a provisional contract on the 30th of August, 1871, though, in consequence of the sale being made under the order of the Court of Chancery, it could not be, as a matter of form, concluded at that time. The Appellants having thus become the purchasers of the lease desired to sell it again and obtain a profit on the resale; and with that view to get up a company to purchase it and work the mines.

Erlanger, a *Paris* banker, was the chief of the syndicate, and his firm managed its pecuniary transactions. On the 16th of September, 1871, the following circular letter was written to the different members of that body, "We have formed a syndicate for the amount of £60,000, for the purchase of the island of *Sombrero*, including the stores. You are interested in the transaction for £ , for which we beg you will send us a cheque, as we

(1) 5 Ch. D. 73, where the facts, of which a summary is here given, are fully set forth.

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have to pay the money into Court." This note was signed, "*Emile Erlanger & Co.*" The cheques were sent, and the money paid into Court, the banking firm being stated on the list as holding an interest in the purchase for "£18,430." The qualification of a director was to be the possession of fifty shares in the company.

A memorandum of association was prepared, and articles and a prospectus were also issued. The memorandum stated, in the usual way, the objects of the company, which were to purchase the lease and work the mines. The articles (among other things), stated that, in the first instance, the number of directors should not be less than four, nor more than seven, but that number might be changed at any general meeting. Two directors were to "form a quorum for the transaction of business." The directors were empowered to adopt and carry into effect the contract for the purchase by the company of the island. The contract for the purchase and the articles of association were both dated on the same day, the 20th of September, 1871, and the company was registered on that day. The contract for the purchase by the company purported to be made between *John Marsh Evans*, as the vendor, and *Francis Pavy*, as the purchaser on behalf of the company. This contract recited the purchase by the syndicate of the 30th of August, but did not name the price then given. The price to the company was to be £110,000, of which £80,000 were to be paid down, and the remaining £30,000 to be satisfied by fully paid-up shares in the new company. The money was to be obtained by the subscriptions for the shares, which were to be 13,000 in number, of £10 each. *Evans* was intimate with Baron *Erlanger*, and appeared to act on his behalf; *Pavy* was a person who had visited the island, and whose name was introduced into the business to represent the company until the contract should be submitted to the directors and adopted by them. The directors were in the first instance named by the syndicate. The first name on the list of directors was that of M. *Drouyn de Lhuys* (who was resident in *France*, occupied with the political affairs of that country), the second that of Mr. *Eastwick*, M.P. (then about to start on a voyage to *Canada*), the third was that of *J. Marsh Evans* (the person named in the contract as the vendor), the fourth was that of Alderman *Dakin*, then Lord Mayor of *London*, and

the last that of Rear-Admiral *Macdonald*. *Westall*, a solicitor, acted in the matter; he was himself one of the syndicate, but he claimed to act in the character of agent, and demanded, and received, the sum of £500 for his services.

There was no distinct account of any shares having ever been held by M. *Drouyn de Lhuys*, nor did he appear to have attended any meeting of the directors of the company, or to have taken any part whatever in the business. Mr. *Eastwick* was stated to have received, as a loan, from *Erlanger's* house the requisite number of shares to constitute him a director; these he afterwards returned, and in *Erlanger's* affidavit it was left doubtful whether he ever took his seat at the board. He resigned his directorship at an early period. Alderman *Dakin* appeared to have paid for his shares and attended the board. *Evans* attended, as did also *Macdonald;* both appeared to have held shares given or lent them by *Erlanger*. The first meeting of directors took place on the 29th of September, 1871. Three were present, *Dakin* (who sat as chairman), *Evans*, and *Macdonald*. *Westall* attended in the character of solicitor, and produced the deed for incorporating the company, and also the contract of purchase for £110,000, and it was resolved "that the said contract be approved and confirmed." A prospectus of the intended company was produced. It was intended to be issued to the public. It began by a statement that the contract for the purchase of the island had been made by the directors, it set forth, in the usual way, the advantages of the concern, and gave the names of the directors, and contained some calculations assuming the form of a statement of past, and also of anticipated, profits. After the publication of the prospectus, the number of applications for shares became considerable.

The first ordinary general meeting of the company took place on the 2nd of February, 1872. At that meeting, presided over by Sir *T. Dakin*, a Mr. *Stephenson* stated that he had heard a rumour that what the company was to buy at £110,000, had, but a few days before, been sold to the persons who were now the vendors to the company, for £55,000, and he alluded to a person, one of the directors for the company, as one of the persons who had made the original purchase, observing, "I think it was an improper transaction that one of the directors should be both the buyer and

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the seller of the property. That requires a little explanation on the part of the board." Sir *T. Dakin* said that he had heard some such rumours; that he was told that Mr. *Evans*, with other gentlemen, had bought this fully a month before the company was thought of or projected; that it appeared to him that the contract between *Evans* and *Pavy* was fully stated in the prospectus, and all those persons who joined the company were invited to look at them; that whether it cost £50,000 or £100,000 was not material to the question; that "it was not bought by one of our members. The gentleman was not a director then, but bought in concert with other people," adding that what it was bought for, he, Sir *T. Dakin*, did not know.

The annual general meeting was held on the 19th of June, 1872; Mr. *Evans* was in the chair. The company had not been successful, and the shareholders passed resolutions appointing a committee of investigation, and adjourned the meeting to a period, at first, of six weeks. The committee reported, recommending the removal of the original directors and the appointment of others, with authority to take such proceedings as they might be advised for the purpose of recovering back the difference between the sums given on the first and on the second purchase. New directors were accordingly appointed at a meeting of the 29th of August, 1872. A correspondence then ensued with Baron *Erlanger* and the other members of the syndicate. Baron *Erlanger* denied all legal liability, but offered to give the company the benefit of the full amount of profit which his firm derived in cash and shares from the transaction. The other members of the syndicate did not answer.

On the 24th of December, 1872, the bill in this suit was filed against *Erlanger*, *Evans*, *Dakin*, *Macdonald*, and others (afterwards amended by the addition of all the members of the syndicate, and others representing interests therein), and prayed that the contract of the 20th of September, 1871, might be set aside; that such of the Defendants as were members of the syndicate might repay to the company the £110,000 with interest, the company delivering up the island and accounting for profits made by working it; or that the members of the syndicate might be ordered to repay the difference, £55,000, between the sum paid by the syndicate and that paid by the company.

The answer of Sir *T. Dakin* was directed to exonerate himself from any imputation of having known the real facts and having in any way misled the company by misrepresenting them; he had approved the contract without making any independent inquiry as to the value or productiveness of the island, and had merely said what he had heard from others.

The answers of the members of the syndicate denied that they stood in any way in a fiduciary position towards the company, insisted on the fairness of the transaction, and imputed the failure of the concern to causes over which they had no control, such as the conduct of the company in working the mines on the island. The delay of the company in claiming relief was also insisted on.

The cause was heard before Vice-Chancellor *Malins* in March and April, 1876, and the bill was ordered to be dismissed, but without costs. On appeal (the notice of appeal being served only on the members of the syndicate or their representatives) the contract was ordered to be rescinded as to all who were members, or representatives of members, of the syndicate, the purchase-money paid by the company repaid, and, on payment of the money so ordered to be repaid to the company, the island was to be restored by the company to the syndicate (1).

This appeal was then brought.

The case was twice argued, first before the Lord Chancellor (Lord *Cairns*), Lord *Penzance*, Lord *O'Hagan*, Lord *Blackburn*, and Lord *Gordon*, and afterwards before the Lord Chancellor (Lord *Cairns*), Lord *Hatherley*, Lord *Penzance*, Lord *O'Hagan*, Lord *Selborne*, Lord *Blackburn*, and Lord *Gordon*.

Mr. *Southgate*, Q.C., and Mr. *Benjamin*, Q.C. (Mr. *Ingle Joyce* was with them), for the Appellants, contended that the members of the syndicate stood in no fiduciary position to the company, but were ordinary vendors, who, having purchased a property, were entitled to sell it again at a profit; that the company had ample means to inquire into and ascertain the value of the property, for that it was well known that the island had been sold under the order of the Court of Chancery, so that consequently the needful information was open to all who chose to take the

(1) 5 Ch. D. 73–125.

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trouble to acquire it; that no fraud whatever had been practised; that the bill was founded on charges of fraud, which not being proved, the bill had been in the first instance rightly dismissed; and that, under the circumstances of this case, the Court could not properly adjudge the rescission of the contract.

The persons representing the company had been guilty of laches, which entirely disentitled the company to the relief sought by the bill. The cases cited in the Courts below were again cited, and in addition, *Hickson* v. *Lombard* (1), *Heymann* v. *The European Central Railway Company* (2), *Parker* v. *McKenna* (3); *Dent's and Forbes' Cases* (4), *Bagnall* v. *Carlton* (5), *Overend & Gurney Co.* v. *Gibb* (6), *Gover's Case* (7), and *Vigers* v. *Pike* (8), were referred to and commented on.

Mr. *J. C. Whitehorne* appeared for an individual Defendant, but was not heard.

Mr. *J. Napier Higgins*, Q.C., and Mr. *Davey*, Q.C. (Mr. *Alexander Young* was with them), for the Respondents:—

The members of the syndicate were the purchasers of the island from the official liquidator; they knew its history and its value; they bought it for £55,000, and almost immediately afterwards got up a company and sold it to that company for £110,000, and they sold it without giving any information whatever to the persons whom they induced to become the buyers. Had they been strangers to the company, they might have been entitled to get as much profit as they could on their purchase. But the reverse was the fact; they were the originators and promoters of the company, and, even more, they were, in fact, its managers. They stood in the most undoubted manner in a fiduciary position towards the company which they created, and governed. The pretended directors were the creatures of *Erlanger*. *Marsh Evans* and *Macdonald* were his absolute nominees, owing their nominal qualifications in shares to him; and the meeting of directors, which was represented as making the purchase, was a meeting of three

(1) Law Rep. 1 H. L. 324.
(2) Law Rep. 7 Eq. 154.
(3) Law Rep. 10 Ch. Ap. 96.
(4) Law Rep. 8 Ch. Ap. 768.
(5) 6 Ch. D. 371.
(6) Law Rep. 5 H. L. 480.
(7) 1 Ch. D. 182.
(8) 8 Cl. & F. 562.

persons styled "directors," but two of whom, namely, these two persons, were in fact mere instruments to execute the will of *Erlanger*. There was no one at that time to exercise an independent opinion on the transaction; and afterwards, when there was a meeting of shareholders to give to the purchase a formal adoption, there was no one to give the shareholders an independent opinion or proper advice. For Sir *Thomas Dakin*, who was a director and took the chair at the meeting, was absolutely unacquainted with the circumstances of the transaction, did not quite know for what the island had been bought, and only supposed that, even at the price at which it was sold, it might be a profitable bargain for the company. It was impossible to say that, under such circumstances, the contract was one which the law could allow to stand. Not only was the real condition of the island concealed from the shareholders, for the prospectus was entirely misleading on that point, but the very date of the sale was misrepresented. It was not true, as was stated on the face of the prospectus, that the directors had entered into the contract on the 20th of September, 1871; for the contract (if it deserved such a name) was merely made between one agent of the vendors to sell and another agent of the vendors to buy. The subsequent transactions were so many additional deceptions practised on the shareholders. The pretended meeting of directors on the 29th of September was in truth no meeting of directors at all, for two of them had not then more than a nominal qualification, and neither then nor afterwards was there any one qualified to give, or capable of giving, disinterested advice to the shareholders.

There had been no delay in this case, such as could affect the right of the shareholders to rescind the contract which had been thus improperly obtained from them. The first ordinary meeting of the shareholders was on the 2nd of February, 1872. Sir *T. Dakin*, who was completely ignorant of all the real circumstances, took the chair. He could only answer Mr. *Stephenson*, who mentioned what rumours there were abroad, by saying that he himself had heard something of those rumours, but he believed that if they got this island at the price there named it would be a good bargain. On the 19th of June, 1872, the annual general meeting of shareholders was held, and then the suspicions which had been suggested at the former meeting being put forward more strongly,

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a committee of investigation was appointed. That committee met, and at an adjourned meeting of shareholders held on the 29th of August, presented a report, the result of which was the removal of the directors originally appointed, and the nomination of other directors, with power to take such proceedings in the name of the company as they might be advised. These new directors sought to settle matters without litigation, and a correspondence ensued, but no satisfactory conclusion was arrived at, and the bill was filed on the 24th of December, 1872. Considering the difficulties in the way of the committee obtaining information, the necessary distance of time between one meeting and another, the reasonable unwillingness to enter on litigation, and the desire to settle without it, there was no ground whatever for imputing delay, such as the law called laches, to those who represented the shareholders; indeed, they had acted with as much promptitude as the nature of the case admitted.

In addition to the cases cited below, *The Imperial Mercantile Credit Association* v. *Coleman* (1), *Dunne* v. *English* (2), *Baker* v. *Monk* (3), *Gover's Case* (4), *Ashbury Railway Company* v. *Riche* (5), *Rothschild* v. *Brookman* (6), *Prendergast* v. *Turton* (7), and *Clegg* v. *Edmondson* (8), were referred to and commented on.

Mr. *Benjamin* replied, and in his reply referred to *Hallows* v. *Fernie* (9) to shew that a suit could not be maintained in this form on behalf of a company, and *Pollard* v. *Clayton* (10) on the subject of laches.

Mr. *Davey* was heard in observing on these cases.

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LORD PENZANCE:—

My Lords, I will state to your Lordships my view of the circumstances under which the purchase now sought to be set aside was originally made.

What happened was this: The syndicate had bought the pro-

(1) Law Rep. 6 H. L. 189.
(2) Law Rep. 18 Eq. 524, and at p. 535.
(3) 4 D. J. & S. 388.
(4) 1 Ch. D. 182.
(5) Law Rep. 7 H. L. 653.
(6) 2 Dow. & Cl. 188.
(7) 1 Y. & C. Ch. C. 98.
(8) 8 D. M. & G. 789.
(9) Law Rep. 3 Ch. Ap. 467, at p. 477.
(10) 1 Kay & J. 462.

perty in question, and it is probable that they bought it with the intention of getting up a company which should buy it of them at an increased price. Baron *Erlanger*, who acted for the syndicate, took steps for that purpose within a few days of the purchase, and there is no proof that any steps were even considered, much less adopted, for dealing with the property in any other way. No time was lost in carrying this intention into effect. The solicitor of the syndicate is set to work—he prepares articles of association and a prospectus. The articles provide that five gentlemen by name shall be the first directors of the company, and that any two of them shall be a quorum to bind the company. They also provide that without any farther authority from the shareholders, these five directors or any two of them may sanction and accept, on the part of the company, a certain contract bearing even date with the articles for the purchase by the company of the property in question. This contract had been prepared by the syndicate themselves, and was on the face of it a contract between *Evans* as the vendor, and *Pavy*, on behalf of the future company, as vendee. Both *Evans* and *Pavy* were persons who had no interest in the property, and were the nominees of the syndicate, and remunerated by them for their trouble. In this contract the syndicate fixed their own price at which the future company was to buy, this price being in round numbers double what they had given for it some days before.

The articles of association were therefore so drawn by the solicitor for the syndicate, that the syndicate had it in their power to select, and did select, the five persons, any two of whom were to become the acting agents of the company for the acceptance or rejection of this bargain, by which the syndicate were to obtain for the property double what they had given for it. In exercising this selection they chose first two gentlemen of high standing, one of whom resided abroad, and the other of whom was about to leave *England* forthwith for *Canada*, but neither of whom would be expected to take part in the decision as to whether this bargain, advantageous as it was to the syndicate, was also advantageous to the company. Of the other three persons nominated, one (*Evans*) was a person residing in *Paris*, who acted in the matter at the desire of Baron *Erlanger*, and who was remunerated

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by him with the gift of 100 paid-up shares in the company. Another, Admiral *Macdonald*, was a personal friend of Baron *Erlanger*, to whom the office of director was offered by him as a pecuniary benefit, and an entrance into business affairs, while the third, Sir *Thomas Dakin*, was the Lord Mayor of *London*, against whose capacity, honesty, and independence, nothing can, I think, be said.

Of the whole five, however, only two—Sir *Thomas Dakin* and, perhaps, M. *Drouyn de Lhuys*—appear, on the 29th of September, 1871, to have embarked their money in the company, and thereby obtained a *bonâ fide* and independent interest in the welfare of the company, such as professed to be secured by the provision in the articles of association that each director shall be the holder of at least fifty shares "in his own right." For *Evans'* shares were given to him by Baron *Erlanger*, Admiral *Macdonald* was to hold shares only as trustee for Baron *Erlanger*, and Mr. *Eastwick* never had any shares except what Baron *Erlanger* lent him.

The agents, then, who were to have the power of binding the company to the purchase in question, having been thus selected by the syndicate, and the articles of association having been signed by seven persons, all of whom it was admitted were connected with Baron *Erlanger* or other members of the syndicate, some of them being clerks of these persons, the next step was to hold a meeting of the directors. This was done on the 29th of September, 1871. It was attended by Sir *Thomas Dakin*, Admiral *Macdonald*, and *Evans*. It was also attended by Mr. *Westall*, the solicitor of the syndicate, and himself (on his own part or that of his friends) a member of the syndicate. His interest in and services for the syndicate had been farther secured by the promise of a special fee of £500.

These three directors, without examination of Mr. *Chatteris'* accounts, without any report from any competent person as to the then condition of the island, or the cost of raising and shipping the phosphate of lime, and, without any inquiry into facts or figures, proceeded at once, under the auspices of the vendors' solicitor, to adopt and ratify the proposed purchase of the island on behalf of the company, which had been completely formed and registered

only eight days previously, and which became thereby bound to pay for the property double the sum which had been settled shortly before by the Vice-Chancellor as its true and marketable value.

Can a contract so obtained be allowed to stand? The bare statement of the facts is, I think, sufficient to condemn it. From that statement I invite your Lordships to draw two conclusions: first, that the company never had an opportunity of exercising, through independent directors, a fair and independent judgment upon the subject of this purchase; and, secondly, that this result was *brought about by the conduct* and contrivance of the vendors themselves. It was the vendors, in their character of promoters, who had the power and the opportunity of creating and forming the company in such a manner that with adequate disclosures of fact, an independent judgment on the company's behalf might have been formed. But instead of so doing they used that power and opportunity for the advancement of their own interests. Placed in this position of unfair advantage over the company which they were about to create, they were, as it seems to me, bound according to the principles constantly acted upon in the Courts of Equity, if they wished to make a valid contract of sale to the company, to nominate independent directors and fully disclose the material facts. The obligation rests upon them to shew they have not made use of the position which they occupied to benefit themselves; but I find no proof in the case that they have discharged that obligation. There is no proof that either Sir *Thomas Dakin* or Admiral *Macdonald* was aware of the price at which the property had just been brought under the authority of the Court of Chancery, nor, indeed, that they even knew that the real vendors were also the promoters of the company. And there is certainly no proof that in the selection of the directors who were to be the company's agents for accepting and affirming the proposed purchase, the vendors used their power as promoters in such a way as to create an independent body capable of acting impartially in defence of the company's interests.

A contract of sale effected under such circumstances is, I conceive, upon principles of equity liable to be set aside.

The principles of equity to which I refer have been illustrated

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in a variety of relations, none of them perhaps precisely similar to that of the present parties, but all resting on the same basis, and one which is strictly applicable to the present case. The relations of principal and agent, trustee and *cestui que trust*, parent and child, guardian and ward, priest and penitent, all furnish instances in which the Courts of Equity have given protection and relief against the pressure of unfair advantage resulting from the relation and mutual position of the parties, whether in matters of contract or gift; and this relation and position of unfair advantage once made apparent, the Courts have always cast upon him who holds that position, the burden of shewing that he has not used it to his own benefit.

I have no difficulty, therefore, in asking your Lordships to assent to the proposition of the Lord Chancellor, that if, within a proper time after the completion of this purchase, a bill had been filed by the company, the purchase must have been set aside. The question remains whether the present bill has been filed with sufficient promptitude for that purpose.

Now, on this question of delay, I confess that I do not think it easy, guiding myself by any decided cases, to come to a conclusion adverse to the company's claim. The nearest approach to a definition of the equitable doctrine upon this head which is to be found amongst the cases cited, is the statement made in the case of *The Lindsay Petroleum Company* v. *Hurd* (1). Delay is there said to be "material where it would be practically unjust to give a remedy either because the party has by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were to be afterwards asserted."

How far the company has brought itself by its conduct within either branch of this definition, I will presently inquire, but I think it is clear that the company having, in the first instance, a right to relieve itself from this contract, which the promoters have unfairly fastened upon it, it is for the vendors to shew affirmatively that the company has forfeited that right. The

(1) Law Rep. 5 P. C. 221.

actual lapse of time before commencing the suit was not very great. Delay, as it seems to me, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay, and it is in many cases particularly applicable to property of a mining character. But delay may also imply acquiescence, and in this aspect it equally bars the Plaintiff's right, for such a contract as is now under consideration is only voidable and not void.

It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief, to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case. And so dealing with the facts of the present case, I find myself unable to conclude affirmatively that it has been made out by the argument at the Bar that either the character of the property, or the way in which the company had dealt with it, did in point of fact preclude the possibility of justice being worked out on the basis of the contract being rescinded. If the decree which has been made does not work out the justice of the case, it should have been pointed out in what respect it fails to do so, and either an amendment of it prayed, or the impossibility of such amendment clearly shewn.

The substantial question, therefore, I think, is whether there was such delay as fairly imports acquiescence.

It is hardly suggested that the company or its executive knew, or had the means of knowing, the material facts before the meeting in February. That meeting was not called to consider any question in connection with the matters now in controversy. It was spoken of as a "*pro formâ* meeting," and it was attended by a minority only of the shareholders. What passed there, I think, shewed that Mr. *Stephenson* had heard the truth about the price at which the promoters had bought, though he had heard it only as a rumour; but he does not appear to have known the circumstances under which *Evans* and *Macdonald* had become directors, or the fact that *Westall* was the solicitor for the promoters, and had received

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£500, and many other material matters. The flourishing prospects, however, of the company, laid before the meeting by others, appear to have silenced Mr. *Stephenson*, and the matter was suffered to drop without farther inquiry at the moment.

Can acquiescence by the company be inferred from the doings of this meeting? I think not. The meeting was so convened that a resolution in favour of acquiescence could hardly have bound the company. How, then, could statements by a single shareholder, coldly received as they were by the others present in the prospect of large profits, go farther to bind the company than a resolution would have done?

How soon, then, after the meeting of February, can the company be said to have known the material facts, or such of them as would make it reasonably their duty to investigate the matter if they meant to take exception to the mode in which the purchase had been effected? There are great difficulties in the way of shareholders in such a case. Those of them who, like Mr. *Stephenson*, conceive that the company has been wronged, have not only to investigate and obtain proof of the facts, but they have to impress a sufficient number of their fellow shareholders with the strength of their case to enable them to pass a resolution (probably hostile to the directors) for a committee of investigation. All this takes time and trouble, and I am unable to perceive that it could well be expected of them, that by means of a special meeting they should have taken the opinion of the company earlier than the next ordinary meeting which occurred in June. At that meeting they brought the matter forward; a committee of investigation was appointed, which reported to the company in the autumn, when a resolution was at once passed to take legal proceedings. This resolution was followed by attempts to compromise, which were continued through the autumn up to November, and in December the bill was filed.

As I have already said, I do not see how Mr. *Stephenson* and those who acted with him can be accused of laches in the course which they thus took. But if it were otherwise I should have great difficulty in coming to the conclusion that the laches of Mr. *Stephenson* was the laches of the company, and that the great bulk of shareholders had lost their relief from an inequitable contract

because a few of them had not been sufficiently prompt in taking steps to obtain that relief.

The position of Mr. *Evans*, whose name appeared as vendor of the property in the contract made on behalf of the company, and whose name also appears as one of the original directors who attended the meeting of the 29th of December, 1871, and affirmed that contract, was much commented upon in the course of the argument. It was said that Mr. *Evans* being thus both vendor and purchaser, the company had at once the right to set aside the contract. But this can hardly be so, I think, in all cases. It is a very common thing for individuals having an established business to get up a company which shall purchase their business of them; they taking part payment in paid-up shares of the company, and becoming original directors. In such cases it is often an inherent part of the scheme, in the interests of the company, that they who already understand the business should take a leading part on the board of directors which is to conduct that business in future, and if all is fair and open in the conduct of such persons, the fullest disclosures being made of all matters material to be known to the company, it would be difficult, I think, to maintain that the purchase which had been adopted by an adequate quorum of independent directors could be set aside merely because one of the directors, who was also a vendor, had concurred in that adoption. In the present case there is nothing on the face of the contract with the company to indicate to the shareholders that Mr. *Evans* was not in a position something like that which I have just described. It might well be surmised by any shareholder who knew nothing of the real facts, that he, either alone or in conjunction with others, had purchased the island and had worked the phosphate of lime previous to the sale to the company of which he was to become a director, taking £20,000 of the purchase-money in paid-up shares of the company, and his position, thus regarded, would hardly, I think, put any shareholder upon inquiry as to the company having been unfairly dealt with.

Upon the whole, then, I am unable to satisfy myself, either that it is not practicable to do justice on the basis of the contract being rescinded, or that the company has by any laches or delay laid itself fairly open to the imputation of having acquiesced in the

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contract which they now seek to set aside; and with some hesitation and diffidence, after having been made aware of the opinion of my noble and learned friend on the woolsack, I must advise your Lordships to reject this appeal.

THE LORD CHANCELLOR (Lord *Cairns*):—

My Lords, the Appellants in this case complain of a decree of the Court of Appeal which has set aside a sale made to the *Sombrero Company*, of the island of *Sombrero*, and ordered repayment and re-transfer by the Appellants of large sums of money and shares which had passed to them from the company on the occasion of the sale.

Your Lordships will observe that the Plaintiff in the action in the Chancery Division was the *Sombrero Company*, and it is necessary to bear this particularly in mind, because it will enable your Lordships to put aside many observations and arguments which are not relevant in the case of an action by the company, although they might have been relevant had an action been brought by a shareholder to throw back his shares on the company, on the ground of misrepresentation or fraud.

In the view which I take of the case, the facts of which it is necessary to remind your Lordships are in a very narrow compass. *Sombrero* is a small island in the *West Indies*, about a mile and a quarter long, in which are deposits or beds of phosphate of lime. It belongs to the Crown, and a lease was made of it for twenty-one years from March, 1865, at a rent of £1000. This lease was assigned, in the first instance, to a company called the *Old Sombrero Company*, who paid £100,000 for it, taking it besides subject to a mortgage of £12,400. This company was wound up by the Court of Chancery, and in the winding-up the lease of the island came in 1871 to be sold. The Appellants along with one *Thomas Westall*, a solicitor, thought well of the speculation, and wished to buy the lease, and for this purpose they formed what is called a syndicate or partnership, and ultimately, on the 30th of August, 1871, did agree to buy the lease by private contract from the official liquidator, *Henry Chatteris*, for £55,000, the contract being made in the name of *Westall* on behalf of his principals.

My Lords, I stop at this point for the purpose of saying that I

think it to be clear that the syndicate in entering into this contract acted on behalf of themselves alone, and did not at that time act in, or occupy, any fiduciary position whatever. It may well be that the prevailing idea in their mind was, not to retain or work the island, but to sell it again at an increase of price, and very possibly, to promote or get up a company to purchase the island from them; but they were, as it seems to me, after their purchase was made, perfectly free to do with the island whatever they liked; to use it as they liked, and to sell it how, and to whom, and for what price they liked. The part of the case of the Respondents which, as an alternative, sought to make the Appellants account for the profit which they made on the re-sale of the property to the Respondents, on an allegation that the Appellants acted in a fiduciary position at the time they made the contract of the 30th of August, 1871, is not, as I think, capable of being supported, and this, as I understand, was the view of all the Judges in the Courts below.

I now proceed to state what happened subsequently to the 30th of August, 1871.

Shortly before the 20th of September, 1871, the syndicate determined to form a joint stock company, and to sell the island to the company for £110,000, and the syndicate took the necessary steps for this purpose; preparing the memorandum of association, and the articles, and also the prospectus which was to be issued.

The memorandum of association stated that the object of the company was the purchasing, leasing, and working of mines or quarries of phosphate of lime in the island of *Sombrero*. The articles stated that the number of directors should from time to time be determined by a general meeting, and that till any other number was determined there should be not less than four nor more than seven directors. Two directors should be a quorum for the transaction of business; and among the acts which the directors were empowered to do were the adoption and carrying into effect of the contract for the assignment to the company of the island of *Sombrero*, dated the same day as the articles, namely, the 20th of September, 1871.

This contract was a contract by which *John Marsh Evans* agreed to sell, and *Francis Pavy* agreed to purchase, the lease of the

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island and the property on it for £110,000, £80,000 to be paid down, and £30,000 in fully paid-up shares of the new company. *John Marsh Evans* was a trustee or agent for Baron *Erlanger* and the other members of the syndicate, and *Pavy* was a person whose name was introduced into the contract as a matter of form, to represent the company about to be created, in case it should adopt the contract. The contract was, on the face of it, a provisional one, subject to the formation of the company, and the adoption of the contract by it.

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In the whole of this proceeding up to this time the syndicate, or the house of *Erlanger* as representing the syndicate, were the promoters of the company, and it is now necessary that I should state to your Lordships in what position I understand the promoters to be placed with reference to the company which they proposed to form. They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and moulding of the company; they have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchaser of the property of themselves, the promoters, it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive, that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company, and then sell his property to it, but I do say that if he does he is bound to take care that he sells it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.

My Lords, if this is the position and duty of a promoter, I ask your Lordships, in the next place, to consider how far that duty was discharged by the promoters in the present case.

The company was, as I have already stated, formed to purchase

mines in the island of *Sombrero*, and the directors were armed specifically with the power of adopting the contract already mentioned of the 20th of September, 1871. The promoters, in framing the constitution of the company, have themselves given us what they considered to be the proper measure of strength of a board of directors who were to be entrusted with the execution of this power. They were to be not less than four nor more than seven, and in point of fact five names were given as the first directors. They were at once to enter upon business, and the first duty they would have to perform would be to consider whether the contract should be adopted or not. How far, then, were they in a position to perform this duty?

The first name was that of his Excellency Monsieur *Drouyn de Lhuys*. I will assume that there is some evidence that he had been communicated with, and had given some assent to the use of his name; but it is not pretended that the idea was ever entertained by the promoters that he either would or could take any part in the first great act of the directors—the adoption of the contract, or that he could attend any meeting for the purpose. Of the second director named, Mr. *Eastwick*, the same may be said. He was absent at a distance from *England*, and did not take his seat at the board till the end of December, 1871. The third director, *John Marsh Evans*, was himself the vendor, and whether he was vendor as being beneficially interested in the property, or as trustee for the syndicate, is, in my opinion, immaterial. There remained two directors, and two only—Sir *Thomas Dakin* and Admiral *Macdonald*, and of these I will speak when I come, as I shall next do, to the first meeting of the directors.

The company was registered on the 21st of September, 1871, and the first meeting of directors took place on the 29th of that month. There were present of the directors, Sir *Thomas Dakin*, Admiral *Macdonald*; and *John Marsh Evans*, who, as I have already said, was himself the vendor. There was also present Mr. *Westall*, who had been appointed and was acting as solicitor for the company, but who was himself one of the syndicate, although it is said that on the syndicate he merely represented certain other names not disclosed, and had himself no interest beyond the promise of a payment of £500.

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At this meeting a prospectus was produced ready for issue to the public, stating that the contract for purchase had been made by the directors; and the first resolution proposed and carried, almost as a matter of course, was that the contract should be approved and confirmed. Neither Sir *Thomas Dakin* nor Admiral *Macdonald* has given evidence in the case, and it is difficult to say positively what they knew or what they inquired, or whether they knew anything or inquired anything, about that which they were professing to buy. The conclusion at which I have arrived from such materials as are before your Lordships is, that both Sir *Thomas Dakin* and Admiral *Macdonald* treated from the first the adoption of the contract as a foregone conclusion. But whether this was so or not, it was the duty of the promoters to take care that the contract for the purchase of their property was submitted to the intelligent consideration of a complete number of independent directors; and I cannot but regard a meeting at which two of the principal directors did not and could not attend, at which one who did attend and take part in the deliberations was at once a person buying and selling, where the legal adviser present and assisting was virtually another vendor, and where the two remaining directors are not shewn to have had the means of exercising, or to have exercised, any intelligent judgment on the subject, as little else than a mockery and a delusion.

I have said nothing, my Lords, as to the provision that two directors should be a quorum. That is a provision which, in my opinion, could not be held to remedy defects such as I have pointed out as going to the entire constitution of the board.

I cannot, therefore, my Lords, entertain any doubt that if, within a proper time after the completion of this purchase, a bill had been filed by the company impeaching it on the grounds that I have stated, the purchase must have been set aside.

The part of the case which, however, has given me the most anxiety is the question whether, having regard to what was made known at the time that the company was formed, and to what became known, and to what also might farther have become known, shortly after it was formed, and having regard, farther, to the very peculiar nature of the property which had been purchased, and to the impossibility of restoring the parties to their original

position, relief can or ought now, consistently with the principles of equity, to be given to those who seek to impeach the contract. On this question I have entertained, and still continue to entertain, considerable doubt, or more than doubt. The case has, however, been twice argued most elaborately and ably, and all of your Lordships are, I believe, of opinion that the company has not lost the right, which undoubtedly it had, to set aside the sale. I do not therefore think it necessary to do more than express generally the grounds of the doubts which on this part of the case I have felt.

The prospectus conveyed to those who became shareholders in the company, and conveyed, therefore, to the company, notice of some facts with regard to this contract which appear to me to be of great importance. The company was informed that the contract was already entered into by its directors. It was termed, no doubt, a provisional contract—that is to say, provisional on the shares being taken and the company completely formed; but, subject to those contingencies, it was a contract actually made. Farther, it was not one out of many contracts that might be made in the course of a business; it was the great central contract of the company, underlying and supporting the whole of their undertaking. The terms of the contract, or at least the principal terms of it, are stated, the price is given, and also an accurate statement of the lease, buildings, machinery, &c., sold. Coupled with this the company is informed that the vendor is one of its own directors, and, therefore, that the contract has been negotiated on behalf of the shareholders between the directors and one of themselves, and they are informed that this contract may be seen at the office of the company's solicitors. We start, therefore, with this, that with reference to a contract which I hold to be voidable, because there was not the exercise upon it of the intelligent judgment of an independent executive, the shareholders are, on the one hand, informed what the terms of the contract are, and, on the other hand, are told that one of their directors has been the vendor in a contract in which he was also, on their behalf, a purchaser.

It is necessary, however, farther to consider the nature of the property as to which the shareholders had this information.

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They are told by the prospectus that it is bought substantially as a going concern, with produce ready for shipment, and contracts for produce pending, which require to be executed. The lease, they know, is a running-out lease, with some years expired, and not a great many to come, and the value of the undertaking dependent not merely on the amount of the deposits in the island, but on the extent to which those deposits could be worked during the lease. The lease is one for the obtaining and putting on the market an article of commerce, the price of which is varying, uncertain, and speculative; outlay is required, the amount of which must vary with circumstances from time to time. Again, the company is aware that it is about to use the name of the property as a trade name, the effect of which will be that, if used unsuccessfully, the name cannot be restored to its original owners otherwise than injured irretrievably by the use thus made of it.

These considerations would, in my opinion, go far to cast upon the company the duty of taking steps at the earliest possible moment, and even before the first general meeting, to examine into and repudiate, if they did not desire to affirm it, a contract which was thus set before them as one *primâ facie* open to impeachment.

No step, however, appears to have been taken by any person connected with the shareholders to impeach the contract. They are content to ignore the fact both that they have not had the independent judgment of all the directors exercised for their protection in making the contract, and also the farther fact, still more calculated to prejudice them, that one of the directors sitting at the board has been a person with an interest entirely antagonistic to their own.

I think it must be taken that those who did not attend the first general meeting of the company held in the month of February had no desire to make any inquiries into the circumstances under which Mr. *John Marsh Evans*, their director, had come to be at once the vendor and the purchaser of the property. With regard to those who did attend that meeting, their views may fairly be taken from what was expressed at the meeting. It is stated that there were about sixty-two shareholders present, and the report

of Mr. *Mackay*, the manager of the company, who had been at *Sombrero*, was read. *Francis Pavy* also explained to the meeting the nature and prospects of the island, with which he was acquainted. I do not go through what was stated at the meeting in detail, but the inference which I draw from the report of the meeting is that no doubt was entertained or expressed by any one present that the rumour, which was openly referred to, that the island had been bought for £55,000, and re-sold for £110,000 within a few days, was otherwise than true; and it was, I think, in substance, admitted by the chairman that Mr. *Evans* might be looked upon as having bought it for the lower sum in concert with other people; but that although he was a director at the time that he sold, he was not a director at the time that he bought. And I cannot but come to the conclusion that those present at the meeting, being impressed with the expectation that the concern was going to turn out a very prosperous one, determined that they would not make any inquiry or raise any objection as to the manner in which the property had come to their hands.

Nothing was done, and no objection was made by any person until the meeting in June, 1872, at which time the shipments of the phosphates had turned out, commercially, to be a failure. At this meeting a committee of investigation was appointed; but even that committee did not suggest that the contract could or should be rescinded, but only that proceedings should be taken for recovery of the profit made by the vendors on the re-sale to the company, and the present bill was not filed until December, 1872, fourteen months after the company had taken possession of and commenced to work the island.

Under these circumstances, looking to the very peculiar nature of the property, and the utter impossibility of restoring the property, and the commercial undertaking connected with it, to the vendors in the state in which it was when the company took possession of it, looking to the amount of notice which the company had by the prospectus, and to the knowledge which they might have obtained by pursuing the inquiries which the prospectus ought to have suggested, I should be of opinion that it would be contrary to the principles of equity to give to the

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company the relief which, at an earlier period, they might have obtained.

LORD HATHERLEY:—

My Lords, after the view which has been so clearly expressed by my noble and learned friend on the woolsack, I certainly feel diffidence in coming to a conclusion contrary to that which he has adopted with reference to whether or not it is competent to the parties who are Plaintiffs in the suit to succeed in their contention, or whether they are not bound in consequence of delay and laches in seeking their remedy, to acquiesce in what has taken place in a matter in which, had they taken proceedings at the earliest moment, they would have been entitled to succeed.

Now, my Lords, in the present contention between the Plaintiffs and the Defendants, there were in the Court below, and there have been in your Lordships' House, three several heads argued, as to some of which every Judge who has heard the case has been agreed.

In the first place the Plaintiffs endeavoured to set aside this contract on the ground of the persons who sold the property having filled a fiduciary position as actual trustees for the company which was formed, and being disentitled to participate in any profit which could be made in the sale in consequence of that trusteeship. The Court below, as well as, I believe, all your Lordships, have been of opinion that they were in no such sense as that trustees for the company; that that which has been called the syndicate, which was formed for the original purchase of the mines, which they did purchase for £55,000 under arrangements made in Vice-Chancellor *Malins'* Chambers in the winding-up of the old company, were entitled to hold that purchase as a syndicate, and to deal with it as they thought proper. Consequently, any authority derived from those cases which insist that no profit can be derived by a trustee out of that which is the property of his *cestui que trust*, has no application to the present case, inasmuch as the syndicate never constituted themselves trustees, but intended to sell, and did sell, this property to the new company or association which was about to be formed, and for the purpose

of making which sale they desired that the company should be formed, and took an interest in its formation. The property was sold for £55,000 to the syndicate, who thereupon became absolute owners of it, and were at liberty to sell it to whomsoever they pleased, and for whatsoever they pleased.

Secondly, my Lords, it was urged in this case, and upon this point also the Courts were agreed, that although the purchase so made was not liable to be interfered with on the ground that I have stated as being a purchase made by persons who were trustees for the company, nevertheless it was liable, if due steps were taken at the proper time, to be impeached upon other grounds disclosed by the bill, and sustained by the evidence. Upon that point my noble and learned friend, who has just addressed the House, has concurred in the view unanimously taken by the learned Judges in the Courts below, and I believe your Lordships are also unanimous on the point. The circumstances of this particular case are such that, if there was no delay and no laches in asserting the remedy, the remedy which the Plaintiffs seek was open to them.

My Lords, the question is therefore reduced simply to this point of delay, and in considering it I think it very important to see what the exact position of the parties was at the moment when the contract was entered into by the company.

My Lords, the Courts of Equity have at all times carefully abstained from attempting a nice definition of imposition with reference to the rights which the practice of such imposition may confer upon the parties injured by it. It is notorious that every mode that can well be conceived of dealing with contracts which ought not to be maintained, in consequence of some deception which vitiates them, has from time to time come before the consideration of the Courts of Equity, and there is scarcely any one which can be set on foot that is not struck at by the general doctrines of the Courts of Equity, although the precise circumstances of this case may have never yet come before the Court. There are three particular classes of cases of what the Court terms fraud which may be pointed to as having some analogy with, or some bearing upon, the present case. The first is as between vendor and purchaser; the next is as between partner and co-partner; and the

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third is the case in which an agent for a purchaser receives a gratuity from the vendor. As to the first of these, a vendor need not do what was at one time asserted by this bill, namely, disclose what he has paid in effecting his own anterior purchase before asking an enhanced price from him to whom he seeks to sell the property; but he must not be guilty of any conduct which amounts to unfair concealment on his part of the real facts of the case, which ought in common fairness to be disclosed to a person seeking to purchase or entering into a treaty with him for that purpose. As regards partners, there is no doubt that one partner is bound to exercise *uberrima fides* with regard to any transactions in which the partners may be engaged in common. There is another class of cases well known in Courts of Equity which has some bearing upon the case before us, and that is where a person acting as agent for a purchaser, that is to say for a person who is minded to purchase, receives a gratuity or a bribe of some description from the intending vendor. In that case again the Courts interfere and say that a negotiation carried on between the agent for the purchaser and the vendor as principal, in which the agent for the purchaser receives benefits or advantages of any kind from the intending vendor, is one which can be impeached, and which would be set aside in a Court of Equity.

My Lords, what has happened here is this: It seems to have come to the knowledge of a gentleman whose name has frequently been before us, a solicitor named Mr. *Westall*, that there was a property to be sold in consequence of the winding-up of the *Old Sombrero Company*, which, as far as he could hear—and I see no reason to impeach the information which he acquired on the subject—was worth more than it appeared likely to fetch in the course of its being put up to auction by the official liquidator in the winding-up case before Vice-Chancellor *Malins*. He took several tentative steps to ascertain what would actually be accepted for the property. First of all he offered £20,000, a very small sum compared with what was afterwards offered and taken; but at last, being compelled to raise his offers, he found that he could acquire the property for £55,000. Thereupon he communicated, apparently, with Baron *Erlanger*, the principal Defendant in the present case, and, without entering into more detail, the result

was that it was contemplated, by those persons who constituted the syndicate (which was principally formed by Baron *Erlanger*), to purchase the property for £55,000, and to sell it, for what they could get, to a company.

All that would be very well; and I am not indisposed to say with my noble and learned friend who first addressed your Lordships, that it would not be made otherwise even by the position of one of the syndicate afterwards as a director of the company, if all had been fully and fairly disclosed by the prospectus to everybody concerned, especially to the persons who were to be formed into a company. If they knew that he was a vendor, or one of the vendors, then, looking to the terms of one of their articles of association (which indeed was only an enunciation of what, I take it, the law would almost presume for them), that he would not be able to take any part in proceedings which concerned his own special and peculiar interests, it might well be that those who were forming themselves into a company would not be indisposed to take such a gentleman into their co-partnership and to let him act even as a director of their company, he being a very competent person, one may suppose, to manage and direct the affairs of the company when once the sale was completed, in which they naturally supposed he would have no voice.

Now, my Lords, that being so, what actually took place? Baron *Erlanger* and those associated with him in the syndicate prepared articles of association and a prospectus to be submitted to the public. The purchase by the syndicate was not actually completed till November. Although it was in September that the deed was executed, it was not to be completed and held valid, as between the official liquidator representing the *Old Sombrero* proprietors and those to whom he was selling, until two months after Vice-Chancellor *Malins'* certificate, and the certificate is, I think, dated in September. Therefore the sale would become finally settled and completed to the syndicate in November. However, the articles of association were executed in September; they thought it well to be prepared with a purchaser by the time the matter should be ripe.

This being done, unfortunately the case takes this turn. Baron *Erlanger* is very active in arranging the board of directors, who

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were to appear as the first directors upon the prospectus of the intended company, and when you look at the constitution of that board (I need hardly say much about it after what was stated by my noble and learned friend on the woolsack), you find that there really was only one independent person as to whom it was in the least degree probable that he would act, and at first there was only one independent person on the board who did act. When I say an "independent person," I mean a person wholly independent of Baron *Erlanger* and what is called the syndicate. One of the first directors was Mr. *Evans*, who was a member of the syndicate, and who was himself, nominally at all events, the purchaser from the official liquidator, the person to whom the conveyance was made for £55,000. Then there was introduced Admiral *Macdonald*, and the correspondence is in evidence which led to his being so introduced. None of your Lordships, after reading that correspondence, would look upon him as a person to stand in an independent position as between Baron *Erlanger*, the principal vendor, or one of the principal vendors, and the company. That makes two out of the body who were likely to act, that body being only three, because the only other person who was at all likely to take part in the proceedings, or indeed who could do so from physical circumstances as to residence, was the then Lord Mayor of *London*, Sir *Thomas Dakin*, as to whom my noble and learned friend on the woolsack has said, and I entirely concur in the observation, not a single remark is to be made as to any want of integrity or capacity. But there he stood alone, because although there were two other persons nominated as original directors of the company, and whose names may have adorned the prospectus, neither of them was really in a position to take part in the business of the company. One of them was a person of considerable eminence, who had been Ambassador to this country from *France*, Monsieur *Drouyn de Lhuys*, and the other was Mr. *Eastwick*, who was then about to leave *England*, and did not attend the first meeting of the directors.

The first meeting of the directors was held, I think, on the 29th of September, after the memorandum and articles of association had been duly registered and the company formed in that sense. The only persons who appeared at this first meeting were Sir

Thomas Dakin, who was in the chair, Mr. *Evans*, Admiral *Macdonald*, and Mr. *Westall*, who, as has already been stated, was the solicitor to the company and also solicitor to the syndicate, and who appears in addition to have derived some benefit from the vendors. It was that circumstance which caused me to make the observation that it was in some degree like the case of an agent for a purchaser receiving a gratuity or present from an intending vendor. Mr. *Westall* had received a present from the syndicate anterior to this first meeting, which was held as I have described.

Now, my Lords, what was done at this first meeting? A resolution was immediately passed that this contract should be carried into effect. I think it has been sufficiently demonstrated by what has been said by both the noble Lords who have preceded me, that a contract so effected cannot, according to any of the ordinary doctrines of the Courts of Equity, be allowed to stand. Therefore, with regard to the purchase made at this first meeting, if any steps had been taken by any persons who had then heard the particulars of this transaction to apply to the Court, it must at once have been set aside. But then, how was any one to apply?

My Lords, when we come to the doctrine of laches, I most readily agree that it must be applied in the most strict form possible to a case like the present, for the reasons which have already been assigned by my noble and learned friend on the woolsack. The whole scheme, object, and intent of the company would be frustrated, of course, if this purchase were set aside. The object for which the company was formed was to deal with mineral property—property of a very delicate character, according to some of the evidence we have before us, and requiring a good deal of sound judgment in the mode of dealing with it, and in the shipping of the produce of the island, so as not to mistake tinsel for gold. In a case of that kind a vendor would be most materially damaged in two ways if the purchase were set aside. In the first place, his property must itself physically be damaged, and in the second place, the character, the good name, and goodwill, which form, no doubt, a part of the property he so sells, would be, I do not say irretrievably, but in a material degree damaged, if not entirely destroyed. That is a case in which persons should be put very

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strictly to immediate and active exertion if they intend to dispute the contract into which they have entered.

But, on the other hand, the objection, that there has not been such immediate and active exertion, does not lie in the mouths of persons who have kept back anything which ought fairly to have been disclosed to those with whom they have been dealing. And in this case it does not, whether we regard the vendors in the first place, or whether we regard Mr. *Evans'* proceedings as a director in the next place. I say it does not become them to find fault with their not being earlier assailed in respect of that which, of course, they desired, by the proceedings they took, as long as possible to conceal. It is not persons who do such things who develop or disclose them. Now, it is not to be supposed that the shareholders in the company would, if they had had the least inkling of those transactions which were kept below board altogether, have entered into the contract. Neither is it to be expected that in the absence of anything which would be likely to induce them to suspect that there was any bad faith, they would suspect anything of the kind. Nor ought they to have the duty imposed upon them of making shrewd inquiry after a contract has been concluded by their own directors, with which they had in the first instance every reason to be perfectly satisfied.

Why should they suppose that Admiral *Macdonald* was in the position he was as to dependence upon, and association with, the principal member of the syndicate? It is true they were told that Mr. *Evans* was the person who received the property from the hands of the official liquidator, and that the contract made with him might be seen. I have already observed upon that. But, as the noble and learned Lord who first addressed your Lordships said, it is possible that a person in that position may discharge his duty, and may carefully abstain from doing more than he ought to do in carrying into effect that transaction, in which he has a double interest. Therefore, although they were told that, to my mind it rather works the other way. The telling them this looks like candour; and, if they were inclined to make minute investigations as to whether they had been deceived or not in the making of the first contract, it would give them reason to suppose something of this kind: "We have been fairly told about Mr. *Evans*,

and we must take care of ourselves as far as we are engaged in any contract with him, but that is all." Could they conceive that, besides having Mr. *Evans* as a director, they had also Mr. *Westall* advising them, a person who had been and was an agent of the syndicate? Could they conceive, farther, that another of the directors, Admiral *Macdonald*, was in the position he was—a fact of which they had no intimation? Could they imagine that their affairs were all in the hands of those who met at that meeting? As to M. *Drouyn de Lhuys*, they might suppose that he was not likely to come here often; but they had no intimation as to his absence, or that of Mr. *Eastwick*. Mr. *Eastwick* was not at that meeting, and he was never likely to be at the board meetings for a considerable time to come—indeed, at this time I think he had not properly qualified himself with shares as a director. Until they knew some of these facts, it seems to me that the simple circumstance of their being told what Mr. *Evans*' position was would not suggest to them the other objections, which, as is agreed by everybody, including my noble and learned friend on the woolsack, constituted a reticence and a hiding of real facts, which, if they had acted upon them at once, would have entitled them to relief.

Now let us see how have they lost it, and when have they lost it. It is very important to consider this. I cannot see what there was (and nothing is alleged) to lead them in any way to entertain a suspicion as to the contract, at all events up to the 2nd of February. For reasons I shall mention presently, I do not think they had anything to make them take a different view on the 2nd of February; but certainly between September and the 2nd of February I cannot see that there was anything in the least degree to make them suppose it was not a *bonâ fide* contract, like any other contract. I may observe—it is in favour of the Defendants—as regards the prospectus, that although it is perhaps rather highly coloured, I do not see in that prospectus (and I am glad to say so) any *indicium* of those frauds which are so constantly perpetrated on the public. However, the real constitution of the board is kept back from the knowledge of the company.

Now, my Lords, at the meeting held on the 2nd of February what takes place? We have at the end of the book a full report of that meeting by a shorthand writer. I call your Lordships'

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attention first to this fact, and ask you to compare that with the report of that same meeting of the 2nd of February, as referred to in the directors' minutes. It is a little curious, as shewing the working of these things, when you seek to bind all the absent shareholders by something that took place at that meeting of sixty out of 400. You find in the note made of the meeting in the directors' book no minute whatever (you would not expect to find it) of anything said by Mr. *Stephenson*, or by any other shareholder, or by anybody concerned in the matter. Now if it was wished to raise any question on the part of those who might be conscious that there was something behind, and desired that that should be brought out, or at all events that the rest of the shareholders should be consulted, as there were only sixty shareholders present at the meeting, this might have been done; there was a shorthand writer's note of all that took place, of all that was said by Mr. *Stephenson* and answered by Sir *Thomas Dakin*, and that report might have been sent round to every shareholder. And it is remarkable that this course was suggested in reference to the meeting of the 29th of August, which received the report made by the committee appointed in June to investigate the affairs of the company. At that meeting of the 29th of August, at which there was a great deal of important discussion, Mr. *Stephenson*, the originator of the discussion and the originator of all the proceedings which were taken to set aside the contract, asked Sir *Thomas Dakin*, towards the end of the meeting, whether it would not be better for the directors on their responsibility—he says he should not like to do it himself—to send an account of the meeting to every shareholder. I merely mention that because it occurred to me that I had frequently seen cases before the Courts in which the notice was brought home to every shareholder in that way; it is not infrequently done by sending to them the fullest report, that is to say, a shorthand writer's report, of all that took place, and then of course they are fixed with the notice of all that was said, suggested, or done on the occasion.

My Lords, how any one of the 400 shareholders except those who were present, was to be brought into a position of supposed cognizance and acquiescence by any conversation that took place at that meeting on the 2nd of February, I confess I am at a loss

to see. I have taken some trouble in going into the authorities which were referred to, and I confess I feel myself at a great loss to find anything to say that those shareholders who were absent from the meeting of the 2nd of February, would be bound by anything there said or done, beyond that which was actually resolved. Of course, whatever was resolved at that meeting they would be bound by. According to the report that we have of those proceedings, there is no suggestion of any doubt or hesitation as to the propriety of the contract. The only doubt or hesitation arises in the conversation of one shareholder with the chairman, and that one shareholder speaks of what he has heard and what he has been told as being mere rumour, and says he only comes to raise the question for this purpose, that whatever may have been done before, he does not think it very well that Mr. *Evans* should remain on the board of direction, if he was really one of the original purchasers. He says, I have heard this talked about, and I do not think it desirable that he should be in that position. I do not see how it would be possible to affect any one of the absent shareholders with any notice of those observations of Mr. *Stephenson's*. It has been suggested that they might become aware of them from the newspapers. Now they might or might not be persons who read the newspapers; and it has never been held that the possibility of their having informed themselves indirectly, when they were not actually informed in any direct way whatever, could be held sufficient to bind absent parties as having received notice of the statements made at a meeting.

Now, my Lords, after the 2nd of February the next meeting was the ordinary meeting of the company held on the 19th of June. At that meeting a thing was done which was of very great importance—a committee of investigation was appointed. Mr. *Stephenson* had, probably by the time this next meeting was held, furnished himself with more detailed information of what had been going on in the previous part of the transactions, and he seems to have brought before that meeting the expediency of appointing a committee of investigation. I do not think there was any direct notice given of that, but whether there was or not, I should hold the absent shareholders bound by that which was *done*, namely, the appointment of the committee of investigation.

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They were so far led to believe that there was something to be inquired into, and that that was of importance in regard to the concerns of the company.

Now, my Lords, I must look, indeed I have looked anxiously, to see whether any delay or laches can be imputed from that time. The shareholders were to meet again six weeks afterwards. They did meet six weeks afterwards, but that was found not to have given time enough for the committee to pursue their investigations to the utmost, and they therefore enlarged the time to the 29th of August. On the 29th of August there was a full meeting held, when everything of course was known, the report of the committee was received, persons were chosen to fill the places which had been occupied by the former directors, and the shareholders must be taken at that time, the 29th of August, to have had full knowledge, or to have been in a position to have acquired full knowledge, of all their rights. But what do they upon that? They resolve (and it seems to me to have been a very reasonable resolution to have come to) that instead of "rushing into litigation," as they express it, that is to say, going at once into litigation, they should endeavour to ascertain all the facts concerning this contract, and endeavour to enter into negotiation with the members of the syndicate who were impugned by the report of the committee. They aimed at the recovery, no doubt at first, of £55,000, as to which they took an erroneous step; but it will be seen by the letter they wrote, which I will next refer to, that there was a full reservation of all their rights.

A resolution to the effect I have stated having been carried on the 29th of August they write on the 16th of September, having in the meantime been advised by counsel as to their rights, this letter to Baron *Erlanger:* "Sir,—You are doubtless acquainted with the report of the recent shareholders' committee of this company, and also with what took place at the late general meeting in reference to the profit of £55,000 made between the price paid to Mr. *Chatteris* and the sum charged to this company for the island of *Sombrero*. The board of directors has now been reconstructed, and the first great object is to obtain a return of this amount for the benefit of the company. They desire, therefore, to open a negotiation with you and the other

gentlemen who were interested in the formation of the company, so as to bring about, if possible, a settlement of this very important question in a perfectly amicable manner." They do not attempt, at this time, to do anything more than obtain what they thought they had a right to ask for, namely, the return of the money which they thought had been unduly obtained from them. But they go on to say, "The directors, therefore, suggest that in this spirit, and entirely without prejudice to the legal rights of the company or yourself, you will be good enough fully to consider the matter in all its bearings, and make such a proposal to them for approval by the shareholders as the unfortunate position of the company and all the circumstances seem to warrant."

Well, my Lords, more than a month passes before the directors get an answer to that letter. The answer is dated the 23rd of October. Baron *Erlanger* explains the delay by his being out of town; but of course it cannot affect the rights of the company or prejudice them in respect of laches that there should have been that long interval of time, nearly five weeks, before they received the answer. When they have got that answer a farther correspondence goes on for some little time between the new directors and Baron *Erlanger*. It is only just to him to say that he makes a very considerable offer with reference to a return of the profit in money and shares; it may not have been all the company were entitled to; that is quite a different matter. The negotiation breaks off at last, on Baron *Erlanger's* declining to disclose the names of the different persons interested in what I have called the syndicate. He may have done so from honourable feelings. I cannot tell what his reason was, but whatever the reason was, it operated effectually in putting a stop to the negotiation.

Now, my Lords, we have the company quite right, as appears to me, down to the 23rd of October with regard to the question of laches. Then the bill was filed on the 24th of December. I confess, that being so, considering the magnitude of the case and the difficulties there would be in the way of any rapid progress, the quantity of information that had to be obtained, and the desirable action of the committee in endeavouring to bring about a compromise, I do not see in that interval between the 23rd of October and the 24th of December, filled up as it was in a great degree,

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although not wholly, with communications with Baron *Erlanger*, that amount of laches which would induce your Lordships to say that the right which, as every Court and every Judge before whom the case has come agrees, once clearly existed, was waived and lost in consequence of the neglect of the company to take steps in due time to free themselves from the contract.

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No doubt the case of a mine is one which we must look into with very great accuracy; and if once we saw the slightest appearance of *mala fides*, if we saw the slightest indication of wavering and indecision as to whether or not the remedy should be taken until they saw how the thing would turn out, that might be a very different matter; but although it is true that things were so prosperous in February that Mr. *Stephenson* seems not to have obtained such a hearing as he otherwise would have done, that was not brought home to the minds of all the shareholders who were not present at that meeting. And even if there was such a degree of wavering on the part of Mr. *Stephenson*, there was certainly no such wavering on the part of anybody else. At the next meeting the appointment takes place of the committee of shareholders, obviously for the purpose of seeing what can be done to free themselves from the contract. Negotiations take place immediately after that, because the committee were recommended to see what could be done by negotiation; and after the failure of the negotiation there is no long or unreasonable time until the filing of the bill.

My Lords, I am sorry to have gone at such length into the matter. Perhaps if I had been present at the original hearing I should have brought my ideas into a more condensed shape. The last hearing was the first as far as I was concerned; it is only just concluded, and I have not had time to put into such a form as I could have wished the observations I have thought fit to offer to your Lordships, and which satisfy me, my Lords, that in this case the appeal ought to fail, and should be dismissed with costs.

LORD O'HAGAN:—

My Lords, in this case all the facts material for our consideration, and all the questions raised upon them, have been so elaborately stated and discussed by my noble and learned friends, that

I cannot, with propriety or advantage, trouble your Lordships by any lengthened observations. I shall only indicate, as briefly as possible, the conclusions to which I have arrived, after anxious consideration.

The original purchase of the island of *Sombrero* was perfectly legitimate—and it was not less so because the object of the purchasers was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction. The law permitted them to take that course, and provided the machinery by which the transfer of their interest might be equitably and beneficially effected for themselves and those with whom they meant to deal. But the privilege given them for promoting such a company for such an object, involved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future shareholders. The power to nominate a directorate is manifestly capable of great abuse, and may involve, in the misuse of it, very evil consequences to multitudes of people who have little capacity to guard themselves. Such a power may or may not have been wisely permitted to exist. I venture to have doubts upon the point. It tempts too much to fraudulent contrivance and mischievous deception; and, at least, it should be watched with jealousy and restrained from employment in such a way as to mislead the ignorant and the unwary. In all such cases the directorate nominated by the promoters should stand between them and the public, with such independence and intelligence, that they may be expected to deal fairly, impartially, and with adequate knowledge in the affairs submitted to their control. If they have not those qualities, they are unworthy of trust. They are the betrayers and not the guardians of the company they govern, and their acts should not receive the sanction of a Court of justice.

Now, my Lords, for reasons repeatedly given by my noble and learned friends, which I shall not detail again, I think that the promoters in this case failed to remember the exigencies of their fiduciary position, when they appointed directors who were in no way independent of themselves, and who did not sustain the interests of the company with ordinary care and intelligence. Of

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the five selected, two were absent from *England*. Mr. *Evans* was the agent of Baron *Erlanger*. Admiral *Macdonald* avowedly held his shares to be used for the Baron's purposes; and Alderman *Dakin*, so far as we are informed, was the only one of the five who fulfilled the conditions which should have been fulfilled by all of them. A member of the syndicate was made the secretary of the directors. He got £500, and *Evans* and *Macdonald* had their shares from the promoters. These persons seem to have represented simply the financier to whom they owed their appointments. They were not independent directors dealing for the shareholders with single regard to their security and advantage.

The value of the island was ascertained by a learned Judge to be £55,000, and, a few days after, circumstances remaining wholly unchanged, a contract for the sale of it, at £110,000, was confirmed, in the absence of M. *Drouyn de Lhuys* and Mr. *Eastwick* by three of the five directors, two of them being Mr. *Evans* and Admiral *Macdonald*, assisted by their solicitor, who, as I have said, was a member of the syndicate. Apparently, there was no inquiry as to the enormous advance in the price beyond that which the Vice-Chancellor had accepted on his judicial responsibility, no consideration of the state of the property—and no intelligent estimate of its capabilities and prospects. If the directors had been nominated merely to ratify any terms the promoters might dictate, they discharged their function; if it was their duty, as it certainly was, to protect the shareholders, they never seem to have thought of doing it. Their conduct was precisely that which might have been anticipated from the character of their selection, and taking that conduct and character together, I concur in, I believe, the unanimous opinion of your Lordships that such a transaction ought not to be allowed to stand.

The promoters, who so forgot their duty to the company they formed, as to give it a directorate without independence of position or vigilance and caution in caring for its interests, must take the consequences. And this without the necessary imputation of evil purpose or conscious fraud. The fiduciary obligation may be violated though there may be no intention to do injustice. If the protection, proper and needful for a person standing at disadvan-

tage in relation to his guardian or his solicitor, or to the promoters of a company, be withheld, the guardian, the solicitor, or the promoters, cannot sustain a contract equitably invalidated by the want of it, merely because it may be impossible to prove that he is impeachable with indirect or improper motives.

My Lords, if for any of the reasons which have been given, the purchase should have been set aside by a Court of Equity, on the filing of a bill immediately after it was made, the remaining question is, whether the Respondents, by their laches or acquiescence, have deprived themselves of the right to a rescission? I cannot think so. No doubt, there is force in the arguments which have been urged as to the peculiar nature of the property, the shortness of the lease, the deterioration of the value, and the consequent difficulty of replacing the parties, on either side, *in statu quo ante*. But, notwithstanding, I have seen no sufficient reason to hold that the lapse of fourteen months, before the suit was instituted, under the peculiar circumstances of the case, disentitled the Respondents to seek relief.

As to the unprosperous dealing with the island and the decrease of its value, Mr. *Higgins* forcibly urged, in his concluding speech, that the persons who dealt with it were those whom the promoters, directly, or through the executive they created, had put in charge of it, and that they could not complain of any injurious change accomplished under the management of their own nominees. But, without reference to this, I am unable to see that there was any unreasonable or avoidable delay in the proceedings. I am not satisfied that anything was disclosed at the meeting of February which, *per se*, would have warranted a suit. The double position of Mr. *Evans*, as vendor and purchaser, which was mentioned on the authority of a rumour, would not alone, of necessity, have nullified the bargain. A vendor may, in certain circumstances, transfer himself with his property and unite, as a director, with them to whom it has passed, making it profitable, on new conditions, for them and for himself. Alone, therefore, the position of Mr. *Evans*, so far as it was apparent, did not necessitate the conclusion that anything unlawful had occurred, and the mere diversity of price, startling as was the increase within a few days from £55,000 to £110,000 would not, of itself, even if it had

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been fully ascertained, as it was not, have made that conclusion necessary.

But, again, be this as it may, the consideration remains, that, whatever occurred at the meeting of February, and whatever may have been the significance and effect of the discussions there, some hundreds of shareholders were absent who were not bound to be present, who had no duty of attendance cast upon them, and no special reason to induce them to attend. The meeting, as the chairman announced, was only "*pro formâ*." There was no notice affecting the directorate or the contract. There was no power at that meeting effectually to meddle with the directors, or to assail their policy. No balance-sheet was to be shewn; no accounts were to be scrutinised. The whole affair was merely formal, and of the doings and speeches on the occasion no notice whatever was given to any one of the hundreds of absent shareholders. In this condition of facts, I think it impossible to say that the occurrences, on that occasion, were of such a nature as to require the company to take immediate action, on peril of the sacrifice of their claim to rescission.

Even as to the persons present, I should not be prepared to say that any knowledge was communicated or any motive for investigation supplied, sufficient to make the delay of proceedings fatal to that claim. It may be that the apparently prosperous state of the business made the shareholders content with their condition, and averse from inquiry; but they did not, therefore, forfeit a right which was vested in them, if I am correct in my opinion as to the first question in the case. And, at all events, I cannot see that those who were absent, the majority, were in any way affected by matters which never came within their cognizance, and which they had neither the obligation nor the capacity to know. Certainly, no authority was produced to shew that they could be so affected; and the attempt to deny them their equitable claim, as if they had been, appears to me unreasonable and unjust.

My Lords, if this view as to the meeting of February be correct, I cannot believe that the subsequent transactions established any case of laches or acquiescence. It would have been very difficult to have had any effective meeting afterwards before the 19th of June. In the meantime, information had been gathered as to the

position of the directors, their relations with the promoters, and other things unknown to those who attended the meeting of February; and a committee was appointed to make farther inquiry. Until the 29th of August, when its report was received, nothing could have been judiciously done. Then came a delay of five weeks, attributable not to the company, but to the Appellants, who did not answer a letter addressed to them on the 16th of September, until the 23rd of October; and two months afterwards, on the 24th of December, the bill was filed.

We must look to the practical possibilities of things in such a case as this, and considering the difficulty of bringing a company into motion against its directorate, the necessity of a careful and minute examination of facts, and the time essential for the preparation of complicated pleadings, I cannot say that the delay of fourteen months is not accounted for, or is so long and so unjustified as to deprive the Respondents of their right to sue.

In matters of this kind, every case must be judged according to its own circumstances. In each, the question must be one of degree—of more or less—and the delay which might be sufficient to bar relief, in one condition of things, may be without any effect in another. But it is notable that in none of the cases has laches been imputed without a lapse of time very much greater than that which we have to consider. All along, for many months, the shareholders had pressed for a return of the £55,000. They do not seem to have been advised to seek rescission of the contract until a late period; but a temporary mistake of the remedy does not extinguish the right to one. As soon as they were fully informed, the proper demand was made and the suit was instituted; and, as I have said, in my opinion, without such delay as disentitled them to maintain it.

Holding, therefore, that on both the points the Court of Appeal was right, I am of opinion that the decree should be affirmed and the appeal dismissed with costs.

LORD SELBORNE:—

My Lords, the contract in this case was adopted as the contract of the company (having been previously prepared for that purpose by the vendors) through the machinery of a board of directors of

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the vendors' own creation, who were so constituted as to be practically incapable of exercising (and who did not, in fact, exercise) any independent judgment on the subject. All the documents were prepared by the vendors' solicitor, who was also made solicitor to the company, and who participated, to the extent of £500, in the vendors' profit. Of the five directors named in the articles of association, two were absent from this country, and were at that time practically incapable of acting; the other three were present when the contract was adopted; but of these, one was the nominal vendor, and the paid agent and trustee of the real vendors; another was a mere instrument in the hands of the vendors, qualified (contrary to the articles) by a loan of shares from Baron *Erlanger*. The third was the Lord Mayor of *London*, and it seems only fair to him to suppose that he was too much occupied with other duties to be able to give much attention to this. The consideration for the sale was £110,000, (partly in shares of the company,) being twice as much as the vendors had paid for the property a month before. Whether this was, or was not, an excessive price to be asked from a company, is a question into which I do not enter. If there had been an independent purchaser and a real bargain, the vendors would have been at liberty to ask what price they pleased; and if that purchaser had agreed to pay more than the property was worth, he could not complain. But there was, in fact, no such purchaser and no such bargain. The vendors themselves managed the whole thing, and they made those who through their means undertook a trust for others, their passive instruments.

By such an adoption of such a contract the company could not be bound in equity, if, when the material facts became known to the shareholders, they sought to be released from it within a reasonable time; nor could the nature of the property (a lease of minerals for years, of speculative value) make any difference in this respect. It was the act of the vendors to put their property, being of that character, in such a position; and, unless some equity arises against the Plaintiffs from some conduct or omission of their own, the vendors must take the consequences of that act. The shareholders were put into possession of the property as a going concern; they took over the manager and all the other agents

whom they found upon it, and did not alter or interfere with the course of management until they found that the manager was not doing his duty properly, when they promptly did what was right, and appointed a new and a fit person to succeed him. There has, therefore, been nothing done, or left undone, to the injury of the property since it came into the company's hands which can now stand in the way of the Plaintiffs' right to relief, unless they have precluded themselves from it by acquiescence; and the relief given by the decree is such as, under these circumstances, is proper and usual, and is granted upon the usual equitable conditions.

With respect to the question of acquiescence, I will first consider how it would have stood if nothing important had taken place at the general meeting of the 2nd of February, 1872—premising that when acquiescence is a bar to an equitable right (which it may be much more easily than to a legal right, especially in mining cases), two things are generally necessary—first, that there should have been sufficient knowledge of the facts on which the equity depends; and, secondly (when a contract is sought to be rescinded), that there should have been substantial freedom of choice and action, independent of the original influence under which the voidable contract was made.

Now, in this case, the original influence of the board of directors nominated by the vendors, who had adopted the contract on the 29th of September, 1871, continued till the meeting of the 19th of June, 1872, when the committee of investigation was appointed; and the new board, resulting from the report of that committee, was not formed until the 29th of August following. After the resolution passed at the meeting of that date authorizing the new board to endeavour to come to "an early settlement with the vendors of the property to the company, so that litigation might, if possible, be avoided" the whole time down to the filing of the bill, appears to me to be sufficiently accounted for; and I think it immaterial that, if the vendors would have consented (which they did not) to give back £55,000, the shareholders would have been willing, on those terms, to retain the property. That the company should, until a settlement was arrived at (or a decree made in case of litigation) continue in possession, and keep the concern going, in a due course of management, was an inevitable necessity

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under the circumstances. A different course (since the vendors did not offer to take back the property) would have given the vendors much more reason to complain of the conduct of the Plaintiffs (so far, at least, as my opinion is concerned) than they now have.

From the formation of the company till the inquiry by the committee of investigation, the shareholders had such knowledge as was communicated to them by the articles of association and the prospectus: and (unless by means of what passed at the meeting of the 2nd of February, 1872), they had no more. They knew, from these original sources of information, that the directors had power to adopt, and had adopted, a contract, previously prepared, for the sale of the property by *Evans* (himself a director), as vendor, to *Pavy*, on behalf of the company, for £110,000; of which contract a copy might be seen at the office of the company's solicitor; and that *Evans* had bought from Mr. *Chatteris*, as liquidator of a former company, under the direction of the Court of Chancery; also, that the working by Mr. *Chatteris* had been profitable. If any shareholder had referred to the contract (as he was invited to do), he would have found in it the date of *Evans's* purchase (30th of August, 1871); but he would not have found what price *Evans* had paid. If this had been sufficient information, no shareholder taking shares on the faith of the articles and the prospectus could have had any ground of complaint: and I should have thought that in that case the company would never have had any equity to rescind the contract. But there was in truth (so far) nothing to suggest to any shareholder that the board of directors had not been properly constituted, or that the directors had been nominated by, or had acted under the influence of, the vendors; or that they had not properly exercised their judgment, and performed their duty. *Evans* was, indeed, stated to be both vendor (as far as appeared, sole vendor) and a director. But this might well be without any interference on his part with the judgment and discretion of his co-directors, as to adopting, or not adopting, the contract. It is no unusual thing for a vendor to be asked, in the interest of a purchasing company, to take a place in its direction. The names with which that of *Evans* was, in this case, associated, were at least sufficient to justify the shareholders in

taking it for granted that everything had been properly and *bonâ fide* done on their part; and I cannot think that, under these circumstances, it would be equitable to hold that they were put upon making farther inquiry, merely by what appeared in the articles of association and in the prospectus.

The remaining question is, whether the discussion which took place at the first general meeting, on the 2nd of February, 1872, alters the case? I think it does not. No notice was given to the shareholders, before that meeting, that any business would be brought before it relative to this contract: and after the meeting no information as to the conversation relative to the contract, which had taken place at it, was communicated to the absent shareholders. The whole number of shareholders was 496, of whom only sixty-two were present. Even as to those sixty-two (I lay aside the particular case of Mr. *Stephenson* who brought the matter forward as a dissatisfied shareholder, but whose individual knowledge or acquiescence, even if he did acquiesce, could not affect the rest), it does not appear to me that any communication was then made which added to their previous knowledge more than one material fact; viz., that the price paid by *Evans* to *Chatteris* was £55,000. If this had been all, if the other directors had dealt *bonâ fide*, and at arm's length with the vendors, as in the due discharge of their duty they ought to have done, the fact that *Evans*, or those whom he represented, had made this large profit by the resale, would not, by itself, have enabled the company to rescind the contract. The suggestion that the contract was or might be voidable, for that or for any other reason, does not appear to have been in any way presented to the minds of the shareholders who attended the meeting; not even by Mr. *Stephenson* himself. So far were the directors from then treating the case as one in which there was an option to rescind or not, that the chairman, Sir *Thomas Dakin*, professed ignorance of the price which *Evans* had paid, and treated it as a matter with which the company had nothing at all to do. It is true that he also represented the bargain as a good one; on grounds, which he doubtless at that time believed to be sufficient; but which afterwards proved to be fallacious. If the question of ratifying or rescinding a contract, then understood or supposed to be voidable, had been

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before the meeting, this might have been very important as leading to the conclusion that the shareholders present desired to ratify and not to rescind it. But, in the actual circumstances of the case, I can only regard such a statement as calculated (especially when taken in connection with the answer made to Mr. *Stephenson*), to confirm the confidence which the shareholders had down to that time placed in the board, and to put them off any farther inquiry into the way in which the duty undertaken by the directors, had been discharged. I cannot, therefore, impute any acquiescence, which would make it inequitable now to rescind the contract, even to those shareholders who were present on the 2nd of February, 1872; much less to those (being seven-eighths of the whole number) who were not there, and who were altogether ignorant of what passed at that meeting.

I think that the decision of the Court of Appeal in Chancery was correct, and ought to be affirmed.

LORD BLACKBURN:—

My Lords, in this suit the Plaintiffs being a limited company, incorporated under the provisions of the *Companies Act*, 1862 (25 & 26 Vict. c. 89), and suing as such, can only ask for relief on grounds affecting them in their corporate capacity. If individuals were deceived by misrepresentations a case might exist entitling such individuals to be personally relieved against the consequences of such misrepresentations, but the company would not have any title to be relieved on account of such misrepresentations to individuals, especially if the misrepresentations were made by those who at the time represented the company. All this is clearly stated by Lord *Cottenham*, in your Lordships' House, in *Vigers* v. *Pike* (1).

But inasmuch as corporations act by individuals who have the proper authority to manage their affairs, and by those who are duly appointed by that governing body to act as agents for the company, it may well happen that proof that the Defendants have deceived the individuals who form the governing body, or the agents appointed by them, is proof that they have deceived the

(1) 8 Cl. & F. at p. 647.

corporation, and gives the corporation a substantive title to relief. And it may happen that the Defendants have corrupted, or unduly influenced, the governing body without deceiving them, so as to get the corporation to make a contract, from which the corporation, on proving such corruption or undue influence, has a right to relief. This again is stated by Lord *Cottenham* (1). And I own it seems to me that, as soon as these distinctions are stated, they appear to be obviously right, and, if they had been borne in mind, a good deal of the first eight days' argument in this case might have been spared.

But I think that, though representations made by the governing body of the company and the Defendants in concert, or by the Defendants alone, with intent to deceive individuals, do not afford any substantive ground for relief to the company, it by no means follows that the statement of such representations in a bill by the company is necessarily impertinent. It may be that such representations may be so made, as to afford strong evidence that the Defendants had either deceived or corrupted that governing body and so obtained the contract against which the company seeks to be relieved, and so tend to prove what, if established, would be a ground for relief to the company.

In the present case the suit was commenced by a bill filed on the 24th of December, 1872, before either of the Judicature Acts was even brought into Parliament. The Vice-Chancellor did not make his decree till the 2nd of June, 1876, after both the Judicature Acts were in force. But the case was conducted throughout according to the old procedure.

The bill originally was against five Defendants, Baron *Erlanger*, *John Marsh Evans*, *Jane Westall*, the executrix of *Thomas Westall*, Sir *Thomas Dakin*, and *Reginald John Macdonald*. After answer, it appearing that *Erlanger* was acting as representative of what is called a syndicate, and asserted that the other members of the syndicate were necessary parties, the bill was amended, making eight persons now along with *Erlanger*, Appellants, and *Frederick Vilmet* and *Alexander McEwen*, and *Thomas Souvene McEwen*, parties to the bill, as Defendants, along with the representative of a person called *Wanklyn*. *Frederick Vilmet* having died, his per-

(1) 8 Cl. & F. at p. 648.

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sonal representative was made a party in his place. And the *McEwens* having become bankrupts, their trustees, *Henry Diver* and *Samuel Price*, were made parties.

The Vice-Chancellor *Malins*, delivered an elaborate judgment (1), and came to the conclusion (2) in these words: "Upon the whole case I find it impossible to make a decree which would do complete justice. It would not, in my opinion, be just to make the extreme decree which is asked for by the Plaintiffs, and I can find no ground for the alternative relief which is asked for, in the return of the difference between what was given and received for the property." As the nearest approach he could make to justice he dismissed the bill without costs against all parties.

The Plaintiff company appealed against this decree, giving notice only to the members of the syndicate and their representatives. The two *McEwens*, and *Price*, their trustee, though duly served, did not appear.

The Court of Appeal declared that the contract of the 20th of September, 1871, was not binding on the company and ought to be rescinded and set aside, and it made a decree that Baron *Erlanger* and the eight members of the syndicate, and the estates of the Defendants, the two *McEwens*, and the estate of the deceased *Frederic Vilmet*, were liable to refund the price paid by the company with interest, and ordered them so to do, and that on their doing so the Plaintiff company should give up possession of the island, and pay any profits that might have been made. The decree was varied by dismissing the bill against *Diver* and *Wanklyn*, with costs.

Against this decree Baron *Erlanger*, the eight members of the syndicate, and the representative of the deceased *Frederick Vilmet*, appeal against the Plaintiff company, and, as a nominal party, against *Price*, who has not appealed.

The Master of the Rolls says (3):—"The object of the action is to set aside the contract upon the ground that it was a contract unfairly obtained, and was not binding upon the company. The defences set up are that it was fairly obtained; that whether it was fairly obtained or not, the company has, by its laches or acqui-

(1) 5 Ch. D. 73. (2) 5 Ch. D. at p. 102.
(3) 5 Ch. D. at p. 103.

escence, precluded itself from suing; and, thirdly, that whether or not the company has so precluded itself, it is not a transaction which could be set aside by the company, though damages might be claimed, in an action by individual shareholders, against those persons who made misrepresentations to them to induce them to accept their shares."

The Appellants' counsel at your Lordships' Bar, I think, made, in addition to those stated above, a farther point that the bill was not so framed as to raise the objection that the contract was unfairly obtained, in the sense in which the Court of Appeal thought it proved. The Master of the Rolls proceeded to state his view of the earlier facts, which I need not repeat. It is in substance what has been already stated by the noble and learned Lord on the woolsack. The Respondents' counsel did not, I think, acquiesce in that statement, but the Appellants, as far as that goes, make no complaint of it.

I think it a correct view, and that it completely negatives the ground of complaint set forth in the 11th paragraph of the bill, that the syndicate had purchased the island as promoters and on behalf of the company for £55,000, and made arrangements by which it was to be made to appear that the company had bought it for £110,000. This, if made out, would have entitled the company not to return the island on the hands of the syndicate and take back the £110,000, but to keep the island and claim the difference, £55,000.

The Justices of Appeal said that the syndicate might lawfully sell to a stranger without telling him anything farther than that they had the island for sale, and that the £110,000 was the price at which it suited them to sell, and leaving it to the purchaser to find out for himself whether it suited him to buy at that price; and that, though no doubt the fact that they had a few days before bought for £55,000 would, if known to that purchaser, make him inquire much more before he came to the conclusion that it was worth £110,000, there was no legal or equitable obligation on the vendors to disclose that fact. Whether a vendor of delicate feelings would like to leave such a fact undisclosed is an irrelevant inquiry. And in this I agree.

They farther said that when the vendors promoted and formed

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a company for the purpose of purchasing at that price, they were not entitled to treat that company as a stranger. As promoters of a company they stood in a fiduciary position towards the company they were creating, and that the bargain between the promoters and that company could not stand unless more was done for the purpose of protecting the interest of that company than was done in this case. It seems to me that the 21st paragraph of the Plaintiff's bill does sufficiently allege such a case; and the first question which I think has to be considered is whether enough is proved in fact, to make a case good in law under which, if the Plaintiffs had come promptly, they would have been entitled to the relief given by the decree appealed against.

The Justices of Appeal were also of opinion that the Defendants' plea of laches was not made out, and that under all the circumstances, the Court could do complete justice by rescinding the contract. The second question is whether the facts proved are such as to justify this decision. The Respondents' counsel contended that if this second question were decided against them, they still were entitled to the alternative relief, and ought to have the £55,000. This third question does not arise if the first and second are decided in favour of the Respondents.

The decision is of very great importance to the parties, from the largeness of the sums involved, but I think it is of even more importance to the public, from the great general importance of the principles which must be considered, and to some extent at least decided, in answering those questions.

I proceed to consider the first of these questions. Throughout the *Companies Act*, 1862 (25 & 26 Vict. c. 89), the word "promoters" is not anywhere used. It is, however, a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company.

Neither does this Act in terms impose any duty on those promoters to have regard to the interests of the company which they are thus empowered to create. But it gives them an almost unlimited power to make the corporation subject to such regulations as they please, and for such purposes as they please, and to create it with a managing body whom they select, having powers such as

they choose to give to those managers, so that the promoters can create such a corporation that the corporation, as soon as it comes into being, may be bound by anything, not in itself illegal, which those promoters have chosen. And I think those who accept and use such extensive powers, which so greatly affect the interests of the corporation when it comes into being, are not entitled to disregard the interests of that corporation altogether. They must make a reasonable use of the powers which they accept from the Legislature with regard to the formation of the corporation, and that requires them to pay some regard to its interests. And consequently they do stand with regard to that corporation when formed, in what is commonly called a fiduciary relation to some extent. Some reference was made in the argument to the *Companies Act*, 1867 (30 & 31 Vict. c. 131, s. 38), on the construction of which there has been a great diversity of judicial opinion. That section does contain the word "promoters," which, as I have already observed, is not to be found in the *Companies Act*, 1862, but it imposes no fresh duty on them with regard to the company. It imposes a fresh duty towards, and gives a new cause of action to, persons who take shares in the company as individuals; it does not affect the obligation of the promoters towards the corporation. I think that the extent of that fiduciary relation, which, as already said, in my opinion, the promoters bear to the company, is a very important consideration in construing that section; and I am desirous to avoid prejudging that question by saying in this case more than is necessary for its decision. I think, as already said, that the promoters are in a situation of confidence to some extent towards the company they form.

Where, as in the present case, the company is formed for the purpose of becoming purchasers from the promoters as vendors, the interests of the promoters and of the company clash. It is the vendor's interest to get as high a price as possible, and they have a strong bias to overvalue the property which they are selling; it is the purchasers' interest to give as low a price as possible, and to secure that the price actually given is not more than the property is really worth to them.

Lord *Eldon*, in *Gibson* v. *Jeyes* (1), says that "it is a great rule

(1) 6 Ves. 278.

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of the Court that he who bargains in matters of advantage with a person placing confidence in him, is bound to shew that a reasonable use has been made of that confidence—a rule applying to trustees, attorneys, or any one else." I think persons having property to sell may form a company for the purpose of buying it in such a manner as to shew this, and when they do so, the sale will be unimpeachable. I will not attempt to define how this may be done. Probably there are many ways. What I shall do is to inquire what, on the evidence, appears to have been done in this case, and then to confine myself to saying whether, on the facts of this particular case, it appears that an unreasonable use has been made of that confidence which the company did not indeed place in the promoters, for the company did not then exist, but which the Legislature did place in them for the company when it gave the promoters power to create it.

The Plaintiffs gave in evidence as against the syndicate the answer of Baron *Erlanger*, whom they did not cross-examine; and most of the facts as to the mode in which the company was formed are proved by his answer. There is, therefore, no dispute as to most of the facts material to the question I am now considering. It appears that *Thomas Westall* (now deceased), a solicitor in a respectable position, was aware that Mr. *Chatteris* was endeavouring to sell the lease of this island under the sanction of the Court of Chancery. In fact the minimum price at which the lease was to be sold was fixed at £55,000, but this Mr. *Westall* did not know. He knew that no one had offered as much as *Chatteris* required, and he formed the opinion (which seems to have been a correct one) that the lease might be purchased at such a price as to be a profitable purchase. He went to Sir *James Anderson* and some others, and brought them to be of the same opinion; but as they thought the matter too heavy for them, he was introduced to Baron *Erlanger*, and negotiated with him to induce him to join with some of his friends in the projected purchase. There were negotiations amongst them which resulted in the formation of the syndicate. It seems that *Westall* had at first wished that his friends, or, whom he represented, should be interested to the extent of one-half in profit or loss of the purchase, and that if the proposed purchase should be brought about by him, he should

receive from the purchasers a special fee of £500 for his professional services in so doing. This share was thought by *Erlanger* too large. Ultimately it was agreed, on the 10th of August, that *Westall's* friends should have one-third share.

It may be as well to read the words of the 15th and 16th paragraphs of the answer: "15. The said *Thomas Westall* mentioned to me the names of several of his friends whom he represented, but, with the exception of the said Sir *James Anderson*, I am unable to remember any of their names; I remember, however, that with the exception aforesaid, I was not acquainted with any of the persons whom the said *Thomas Westall* named, and I stated to him that inasmuch as they were strangers to me, I objected to be mixed up with them individually in the business, and it was then and there agreed between us that I should individually have no dealings with any of them, except the said Sir *James Anderson*, and that with that exception, none of them should be considered members of the syndicate when formed, but that the said *Thomas Westall* should, with the exception aforesaid, represent his friends, and should, with reference to the other members of such syndicate, be considered as a principal, but merely in the character of representing his said friends. At the interview last aforesaid, and also repeatedly on subsequent occasions, the said *Thomas Westall* assured me that he himself had no personal or pecuniary interest in the transaction over and above the fee which he had, as hereinbefore mentioned, stipulated to receive, and that he merely acted for others who were intending purchasers, and on whose behalf he should have sought for some other combination if I had declined to join with them. 16. At the same interview, acting on behalf of myself and my friends hereinbefore mentioned, I authorized the said *Thomas Westall* to make the said *Henry Chatteris* an offer of £45,000 for the said property." *Westall* could not obtain the property for £45,000. Mr. *Chatteris* appears to have told him he might have it for £55,000 if he offered that sum on the 30th of August. This was communicated by telegraph to Baron *Erlanger*, then in *Scotland*, who by telegram authorized the purchase at that price, and *Westall* on that day (30th August, 1871) signed a memorandum of purchase, signed it in his own name—"*Thomas Westall*, for principal to be declared." His principal really was the syndi-

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cate. When, however, the formal contract came to be drawn out, Mr. *Westall* gave in the name of *John Marsh Evans*, who was a person nominated by Baron *Erlanger* to act as agent for the syndicate in that behalf, and the formal contract was drawn out in his name. It was subject to approval by the Vice-Chancellor.

The contract was not approved till the 15th of September. The deposit of £10 per cent. was paid out of the funds of the syndicate, and the balance of the price was also paid in that way, and it was completely their purchase, though the name of *Evans* was used.

All who were concerned in this purchase must have known that the phosphate in the island could hardly practically be worked except through the medium of a company. And though it was possible that they might find persons willing to purchase their bargain, on behalf of a company to be formed by those persons, without any intervention of the syndicate in its formation, they must, I think, have known that it was most likely that they would have to form, or at least to take part in forming, that company themselves. And as early as the 5th of September, six days only after the bargain was bound, subject to the approval of the Vice-Chancellor, and ten days before that approval, *Westall* began to take steps to form that company.

Up to this time I see nothing illegal or inequitable in what was done, but I think and submit to your Lordships that *Westall* and *Evans*, though having no share in the profit and loss of the syndicate, had so connected themselves with it as to be quite as incapable of giving a disinterested protection to the interests of the company, as if they had been beneficially interested in the sale to the company.

Mr. *Westall* proceeded to take all the legal steps for the formation of the company. He drew up the memorandum of association. He prepared a contract, the contract to be made between *Evans* (in whose name the contract with *Chatteris* had been made) and one *Pavy*, for the sale to *Pavy* of this property for £110,000, subject to the new company, then in process of formation, being duly formed and completed. And by a memorandum, signed after it was formed, *Pavy* declared himself to have signed as agent for that company. *Pavy* was a nominee of the syndicate,

who certainly could give no independent protection to the interests of that company. But it was never pretended that he would do so, or could do so. He had no more to do with the substance of the matter than the releasee to uses has to do with the substance of the conveyance. His name was used as a part of the machinery by means of which, under the powers in the articles of association, the property of the promoters was to be transferred to the company for £110,000. Other machinery might have been adopted to effectuate this, but if sufficient steps had been taken otherwise to protect the interest of the company, I do not see that any complaint could justly have been made of the adoption of this machinery.

The memorandum of association was signed by *John Marsh Evans* and six other persons, all of whom it was admitted were mere nominees of the syndicate, and none of them was in a condition to afford disinterested protection to the interests of the company.

Mr. *Westall* also prepared the articles of association for the company. Two of the articles were important, namely: "(65) The number of directors shall from time to time be determined by the company in general meeting; until any other number is so determined there shall not be less than four directors nor more than seven. The first directors shall be, His Excellency Monsieur *Drouyn de Lhuys, E. B. Eastwick*, Esq., the Right Honourable *Thomas Dakin, John Marsh Evans*, Esq., and Rear-Admiral *R. John Macdonald*." Of those five persons thus named as the first directors, one, Mr. *Evans*, was from his position incapable of affording the company disinterested protection. In my mind, the real question here is whether the other four, or any of them, were persons so situated that they could form an unbiassed judgment for the company, and, if they were, whether the promoters had given them such information, and so acted towards them, as to be entitled to act on the belief that they had exercised that unbiassed judgment.

Before proceeding to this, I must mention the 82nd article of the association, which is: "In their management of the business of the company the directors may, without any farther power or authority from the members, do the following things, viz.:— 1st. They may adopt and carry into effect the contract for the

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assignment to the company, bearing even date herewith, of the island of *Sombrero*, in the *West Indies*, and the factory, buildings, and works thereon, for the residue of a term of twenty-one years from the 16th day of March, 1865, subject to the provisions contained in the lease thereof."

On the 5th of September *Westall* proceeded to get evidence of the value of the island for the purpose of using it in the prospectus. This consisted of two letters, one from Mr. *Chatteris* to Messrs. *Pickford* and *Winkfield*, who had been largely engaged in the sale of phosphate for the former company, and one from Mr. *Pickford*, a member of that firm, to Mr. *Westall*. These letters were as follows:—"*London*, 5th September, 1871.—*Re Sombrero Phosphate Company, Limited.*—Messrs *Pickford* and *Winkfield*, 148½ *Fenchurch Street.*—Dear Sirs,—Since I have been liquidator, I have sold and received the proceeds of thirty-five cargoes representing tons 16,127 : 3 : 15, which have realized the sum of £38,960. 3*s*. 6*d*. To raise and ship these cargoes there has been sent to the island £11,300 in cash, and in stores £4579. 2*s*. 8*d*.; so that the cost has been £15,879. 2*s*. 8*d*., and the profit £23081. 0*s*. 10*d*., or 28/7½ per ton.—I am, Dear Sirs, yours truly (Signed) *Henry Chatteris*, Official Liquidator." The other letter is this: "148½, *Fenchurch Street, London*, 6th September, 1871.—*Thomas Westall*, Esq.—Dear Sir,—With this I send you statement of cargoes of phosphate sold by Mr. *Chatteris*, together with a letter from that gentleman shewing a nett profit of 28/7½ per ton. I may mention this was the result of working from July, 1870, to May, 1871, the cargoes since that date not being completed. I should also draw your attention to the prices being much below present rates, the last cargoes having been sold at £5 per ton on 70%. If the whole had been sold at this price, at which probably future sales can be made, there would have been £12,065 14*s*. 1*d*. more to add to the £23,081. 0*s* 10*d*.—Yours faithfully, *William Pickford*.—Please return documents when done with."

A great deal was said about the prospectus based on these letters being fraudulent. If this had been made out it would not have formed a substantive ground for relief to the company, but it would, I think, have been very material evidence that the board of directors who adopted and issued the fraudulent prospectus were

under the undue influence of those who framed it. But I think the cross-examination of *Pickford* quite failed in making out anything like fraud. It is possible (though I think not proved) that a closer examination of *Chatteris'* books would have shewn that Mr. *Pickford* was in error in thinking that the profit shewn was the result of *ten* months working and not of twelve, which obviously makes a great difference; and I think if Mr. *Westall* had been acting for a purchaser he would probably have tested this more closely than he did. But more than this I think was not proved.

How, then, stands the case as to the five persons named as the first directors? M. *de Lhuys* was requested by *Erlanger* to act as a director, and he assented. It is not pretended that he made, or was expected to make, any independent inquiry on behalf of the company. He was asked to be a director because, from his position, he would be influential in promoting the sale of phosphate on the continent; and he assented, trusting entirely to Baron *Erlanger*. I see no harm in this on either side, but it afforded no protection to the company.

Mr. *Eastwick* had applied to *Erlanger* personally to be allowed to join the company, but had gone to *Canada*, leaving it to some friend in his absence to make farther inquiries. On his return he was not satisfied with the inquiries which had been made. In the 75th paragraph of *Erlanger's* answer it is said, "During my absence from *London* the said *Edward Backhouse Eastwick* applied to my firm for a temporary loan of the shares necessary for his share qualification, on the ground that he had not determined whether or not he should continue to be a director of the company; and he afterwards restored such shares to my firm upon his ceasing to be a director as herein mentioned." "The said *Edward Backhouse Eastwick* was abroad at the date of the incorporation of the Plaintiff company. I do not know and cannot state as to my belief, or otherwise, whether or not he did not return to this country till late in the year 1871, or whether he did or not take his seat at the board for the first time on the 29th of December, 1871, or on what day he did so take his seat, or whether he did or not resign it on the 8th day of April, 1872, or on what day he did so resign it. I believe, however, that he did take his seat and did after-

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wards resign it." I think this is quite enough to shew that there could be no protection afforded to the company by any independent inquiry on the part of *Eastwick*.

As to Admiral *Macdonald*, I do not suppose he would have lent himself to anything he thought wrong, but he evidently came into the company with a foregone conclusion that everything his friend *Erlanger* had done was right. I do not say that this was not a *bonâ fide* belief on his part, but he came in under such circumstances that he could not be expected to make any independent inquiry; and if he had made one, it would have required very great moral courage in him under such circumstances to say that anything done by *Erlanger*, was wrong. Under such a bias he could afford no protection to the company.

Evans was the agent of the syndicate. The company could not therefore, have any protection unless from Sir *Thomas Dakin*. He was, or had recently been, Lord Mayor. He was quite disinterested, and he embarked his own money in the company; and he certainly ought before lending his name as a director to have made some inquiry, especially as it is impossible to suppose he was not aware that those getting up the company were the vendors of the lease. The evidence as regards him is in such a state as to give me much embarrassment.

The shorthand writer's report of the meeting of the company on the 29th of August, 1872, has been put in and is printed, and it appears that Sir *Thomas Dakin* there made a speech containing important statements. This, however, is not evidence of more than that Sir *Thomas Dakin* made such statements. He filed an answer in the Vice-Chancellor's Court which was read as against him, but was not evidence against the now Appellants, and I do not know its contents. It is a probable conjecture that he repeated upon oath what he had previously stated verbally, and as no appeal has been brought against him, it is fair to assume in his favour that his explanation was satisfactory. Still this is not evidence against the syndicate.

The bill of complaint (paragraph 43) notices the statement of Sir *Thomas Dakin*, but only for the purpose of charging that, notwithstanding his assertion to the contrary, he did know that *Evans* had contracted to buy at £55,000. And, as far as I can

see, the only evidence on which the Plaintiffs can now rely is the Appellant's answer.

I think, however, that under such circumstances the burden of proof lies on the fiduciary agents, agents selling to those to whom they owed a duty to prove, if not that sufficient protection had been afforded, at least that they had sufficient reasons for *bonâ fide* believing that sufficient protection had been afforded to their purchasers. If they could have proved that Sir *Thomas Dakin* was told that the price at which the property had been recently bought was £55,000, and also that he knew that *Westall*, by whom the prospectus was prepared, from evidence which he had collected, was not a disinterested attorney, but one having a strong bias in favour of the vendors, they should have done so. If such proof had been given, and it had been shewn that Sir *Thomas Dakin*, well aware that for these reasons he should receive the statements and evidence of value with caution, had satisfied himself that the bargain was a good one at £110,000, the case would have been very different. I doubt whether the opinion of one disinterested person so obtained would have been enough protection, but that it is not necessary to consider if, as I think, it is not proved that even this slight degree of protection was given.

My Lords, I have felt much doubt and difficulty as to the second question, though, on the whole, I think the Plaintiffs have not lost their remedy.

Several points were made and argued, as to which I think it unnecessary to say more than that I think they were satisfactorily disposed of in the judgments below. That on which I have difficulty, and to which I shall confine my remarks, is whether laches and acquiescence is made out to such an extent as to deprive the company of the remedy by rescission which they had if they had come promptly. Some things are to my mind clear. The contract was not void, but only voidable at the election of the company.

In *Clough* v. *The London and North Western Railway Company* (1), in the judgment of the Exchequer Chamber, it is said, "We agree that the contract continues valid till the party defrauded has determined his election by avoiding it. In such cases,

(1) Law Rep. 7 Ex. 34, 35.

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(*i.e.*, of fraud) the question is, Has the person on whom the fraud was practised, having notice of the fraud, elected not to avoid the contract? Or, Has he elected to avoid it? Or, Has he made no election? We think that so long as he has made no election he retains the right to determine it either way; subject to this, that if, in the interval whilst he is deliberating, an innocent third party has acquired an interest in the property, or if, *in consequence of his delay the position even of the wrongdoer is affected*, it will preclude him from exercising his right to rescind." It is, I think, clear on principles of general justice, that as a condition to a rescission there must be a *restitutio in integrum*. The parties must be put *in statu quo*. See *per* Lord *Cranworth* in *Addie* v. *The Western Bank* (1). It is a doctrine which has often been acted upon both at law and in equity. But there is a considerable difference in the mode in which it is applied in Courts of Law and Equity, owing, as I think, to the difference of the machinery which the Courts have at command. I speak of these Courts as they were at the time when this suit commenced, without inquiring whether the Judicature Acts make any, or if any, what difference.

It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without accounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration. But as a Court of Law has no machinery at its command for taking an account of such matters, the defrauded party, if he sought his remedy at law, must in such cases keep the property and sue in an action for deceit, in which the jury, if properly directed, can do complete justice by giving as damages a full indemnity for all that the party has lost: see *Clarke* v. *Dixon* (2), and the cases there cited.

But a Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can take accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of

(1) Law Rep. 1 H. L., Sc. 165. (2) E. B. & E. 148.

its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract. And a Court of Equity requires that those who come to it to ask its active interposition to give them relief, should use due diligence, after there has been such notice or knowledge as to make it inequitable to lie by. And any change which occurs in the position of the parties or the state of the property after such notice or knowledge should tell much more against the party *in morâ*, than a similar change before he was *in morâ* should do.

In *Lindsay Petroleum Company* v. *Hurd* (1), it is said: "The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be *practically unjust* to give a remedy, either because the party has, by his conduct done that which might fairly be regarded as equivalent to a waiver of it, or where, by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy." I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and

(1) Law Rep. 5 P. C. 239.

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must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.

The Plaintiffs in this case are an incorporated company; but I think that in considering the question of laches the Court cannot divest itself of the knowledge that the corporation is an aggregate of individuals. The knowledge of one shareholder is not the knowledge of the others; but I think great injustice might sometimes be done if it were held that where it is shewn that all the shareholders who paid reasonable attention to the affairs of the company had notice sufficient to make it laches in them not to act promptly, there could not be laches in the company unless the notice was brought home to the company in its corporate capacity. But at the same time it should be recollected that shareholders who seek to set aside a contract made by the governing body, have practically first to change that governing body, and must have time to do so. Now in the present case every allottee had from the beginning by the prospectus full notice that the vendor, *John Marsh Evans*, was also one of their directors, which alone might have given them an equity to set aside the contract, though in every other respect it was unimpeachable. If that had been the only ground on which the shareholders were entitled to relief, its seems clear that it would have been impossible to give it even the day after the directors took possession and paid the price. They had, however, much more substantial equities, but they had also notice of more, for the prospectus referring to the contract, which was open to inspection at the office, I think each allottee was fixed with the knowledge, which he would have had if he had read it, that *Evans* had purchased from *Chatteris* so recently as the 30th of August, not quite three weeks before he sold to the company. He would have not known at what price it had been purchased, but as that was known to all who had an interest in the company under liquidation, either as creditors or contributors, it could very easily have been ascertained. And, in fact, it was known and stated at the meeting in February. Now though this was not actual knowledge that the other four directors had not made independent inquiry before making the purchase, it was enough, in my opinion, to have put any reasonable shareholder

upon inquiry. And the circumstances attending the nature of the property, which are mentioned by the Lord Chancellor in his opinion, were such as to make it proper for those who intended to get rid of the bargain to act with considerable promptitude. What weighs most with me is that it appears that if the price of phosphate had not fallen below £5 a ton, there would have been a profit of £1 a ton, and the bargain would not have been a bad one; if it had risen the bargain would have been a good one, and would no doubt have been approved. But I see nothing to lead to the conclusion that the shareholders were waiting to see how the market turned out. Prices no doubt began to fall about February, 1872, and continued to fall, but not with a sudden fall. If I thought the shareholders had been waiting to see how the market ruled it might have made a difference in my opinion. If no steps to repudiate a purchase of a lottery ticket were taken till after the ticket came up a blank, so that the purchaser, if it came up a prize, might have kept it, it would surely be inequitable to set aside the contract then. And though not nearly so strong a case, such delay seems to be somewhat of that nature.

I cannot read Mr. *Stephenson's* cross-examination without coming to the conclusion that the shareholders present at the meeting in February were so possessed with the idea that the bargain was a good one that they would not listen to him; and if they had been competent to do so would have approved the contract. But they could not do so; they were not even a majority. A meeting convened with due notice that this business was to be considered might have probably ratified it, but no other meeting could have done so. So far the company have the benefit of their impersonality. But then comes in the question which weighs with me on the other side; what steps could Mr. *Stephenson* and those who thought with him, take? for unless they could have done something which they did not do, they can hardly be charged with laches. Before they could take any step to disapprove this contract they must get a majority of the shareholders, at a meeting duly convened with notice, to agree with them, and they must practically get rid of the board who had adopted the contract. They might have taken steps to have a meeting specially con-

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vened, but I think it was not laches to wait till the regular meeting in June. If the shareholders had continued in the temper of those who met in February, they must then have failed. But, before the meeting in June, it was discovered that, greatly owing to the negligence of those who shipped the phosphate (a cause for which the syndicate were not to blame), the early shipments instead of producing a large profit had produced a loss, and the temper of the shareholders was changed; they unanimously appointed a committee of investigation, who without any delay made a report substantially disclosing the whole of what is now the Plaintiff's case. Even in that report it is not proposed to repudiate the contract; the committee expresses the hope that a net profit of £1 per ton may be realized on 10,000 tons per annum (which I may observe would give a fair dividend on £130,000), and recommends that the existing board of directors should be turned out, and the new board should be authorized to take proceedings to recover the difference between the £110,000 paid by the shareholders to the syndicate for the lease, and the £55,000 paid by the syndicate to *Chatteris;* and this is, I think, of some weight in favour of the Defendants. But I cannot assent to the argument that the resolution to adopt this report was equivalent to a resolution affirming the purchase.

On the other hand, I feel that there is much force in the observation that those who deal inequitably with a company know that it must necessarily be slow in its proceedings, and are not entitled to complain that time elapses; and that it is not desirable that such a rule should be laid down as would practically deprive a company when defrauded of relief. And this is a reason against considering a company as precluded from that relief to which it would otherwise be entitled, on account of delay, unless the delay is excessive. I can find no case in which even a private individual has been precluded by mere delay, except where the delay has been very much greater than in this case. In *Prendergrast* v. *Turton* (1) nine years elapsed. In *Clegg* v. *Edmondson* (2), nearly as long; and in both cases the Plaintiff had lain by whilst the Defendants were investing money in the mine, until that investment proved to be remunerative. It was clearly not equitable

(1) 1 Y. & C. Ch. C. 98. (2) 8 D. M. & G. 789.

to leave the Defendants to all the risk of loss, and claim to themselves a profit; and this seems to be what Lord *Eldon* principally relied on in *Norway* v. *Rowe* (1). In the present case that is no ground for imputing to the Plaintiffs what Lord *Lyndhurst* in *Prendergrast* v. *Turton* (2) calls a "conditional acquiescence." As is pointed out in *Clarke* v. *Hart* (3), there was in *Prendergrast* v. *Turton* (2) very nearly, if not quite a legal defence. Here, taking the time at which the active shareholders were put upon exerting diligence to be February, there was not quite nine months before the filing of the bill; that is not very long for getting the majority of shareholders to make an inquiry, turn out the board, and get proper advice, before instituting a Chancery suit. And having come to the conclusion before, that the company had once had the right to this relief, I think the burthen is on the Defendants to shew that the company have precluded themselves from the relief to which they had a right. I do not think this is made out.

It is, in the view I take of the case, unnecessary to consider the third question.

I am of opinion that the judgment below should be affirmed with costs.

LORD GORDON:—

My Lords, the facts of the case have been so fully narrated by your Lordships who have preceded me that it is unnecessary that I should do more than very briefly refer to them.

I have no doubt that the syndicate which was formed for the purchase of the interest of the *Old Sombrero* company in the island in question, and by whom the rights of the *Old Sombrero* company was purchased, acquired the properly for its own behoof, and not in trust for the company which was afterwards formed. The property, when purchased, belonged absolutely to the members of the syndicate, who were entitled to deal with it in any way they thought proper. Having acquired the property, the syndicate resolved to form a company for the working of the produce of the island, and to make over the purchase to that company. They

(1) 19 Ves. 144. (2) 1 Y. & C. Ch. C. 98.
(3) 6 H. L. C. 633.

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became promoters of the company, and prepared the necessary documents for its formation, and issued a prospectus to the public with the view of inducing the public to take up its shares. In doing this the syndicate changed the position it originally held, and put itself in a fiduciary relation to the company which it was engaged in forming. It thus became incumbent on the promoters not only to make a full disclosure of the position they as owners of the property which they proposed to sell to the company held in regard to that property, but also to make arrangements, by the appointment of competent officials, and otherwise, for enabling the company to form an independent judgment as to the propriety of purchasing the property of the promoters, and of the value of that property, and the price to be paid for it. I agree with your Lordships in thinking that the promoters failed in their duty in this respect, and that the company was not put in a position for forming an intelligent and independent judgment as to the contract between the promoters and the company; and that if the contract had been challenged by the company in proper time it might have been set aside.

The only questions of difficulty in the case are whether the contract *has* been challenged in due time; or whether there has been such *laches* on the part of the shareholders as to prevent their now demanding the rescission of their contract; and whether the terms on which the Court of Appeal has set aside the contract are fair and equitable. These questions depend very much upon the procedure and practice of the Court of Chancery; and, therefore, I may be excused in finding considerable difficulty in expressing an opinion on them, especially after the doubts which have been stated by the noble and learned Lord on the woolsack. But your Lordships have had the benefit of the judgments of noble and learned Lords familiar and conversant with the rules which prevail in the Court of Chancery. And, after very careful consideration, I am of opinion that the company has not lost its right of challenge.

The first meeting of the company was not held till February, 1872; and at that time it is evident that the shareholders knew very little of the circumstances under which the company was formed, or the directors appointed. No doubt one of the share-

holders, Mr. *Stephenson*, seems to have had a suspicion that there was something wrong, and he made some inquiries; but I think there was nothing said or resolved at that meeting which could be construed into acquiescence by the company in the adoption of the contract in question. At the meeting in June a committee of investigation was appointed to inquire into the circumstances under which the property of the company was purchased, and power was given to that committee to examine all books, papers, and accounts belonging to the company. That, in my view, was an initiatory step taken by the company towards the challenge of the contract, and certainly shewed that the company was not prepared, without ascertaining the facts, to approve of what had been done by the directors. The report which was prepared by the committee so appointed, brought to light much that was objectionable in the conduct of the promoters of the company and of the directors; and on its being considered by the meeting of the company held on the 29th of August, 1872, new directors were appointed, who were instructed "to take all necessary measures for bringing about an early settlement with the vendors of the property to the company so that litigation may if possible be avoided." Negotiations were thereupon opened with the promoters with a view to a compromise, and these were not concluded till the end of October, 1872. The bill of complaint in the present suit was filed on the 24th of December, and considering the magnitude and difficulty of the case, I think there cannot be said to have been undue delay in the institution of the proceedings in the time which elapsed between the breaking off of the negotiations for a compromise and the filing of the bill.

I consider, therefore, that the fault lay originally with the promoters in not making a full and fair disclosure to the company, and in not putting the company into a position in which to consider properly the propriety of entering into the contract in question; and, in my view, the contract might have been set aside if it had been timeously challenged. In considering the question, I must bear in mind the difficulty referred to by my noble and learned friend who spoke last, which presents itself to the shareholders of an incorporated company in resolving upon proceedings to be taken against the directors and those who have the management

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of the company. I am therefore of opinion that the onus lay on the Appellants of shewing that there had been such laches on the part of the company as to deprive it of the right to set aside the contract. I think that the Appellants have failed to shew that there have been such laches on the part of the company. And therefore I am of opinion that the judgment appealed against is right, and should be affirmed.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 31st July, 1878.

Solicitors for the Appellants: *Bischoff, Bompas, & Bischoff.*
Solicitor for the Respondents: *John Holmes.*

[HOUSE OF LORDS.]

MRS. TAYLOR . . . . . APPELLANT; H. L. (Sc.)
GRAHAM AND OTHERS . . . . . RESPONDENTS. 1878
EX PARTE. *July* 12.

Settlement—Succession—Vesting—Intention of Testator.

A testator directed his trustees to hold and apply the residue of his estate for behoof of his nieces and their children in certain proportions, viz.:—one-third to *A.* in life-rent, and her children in fee; one-third to *B.* in life-rent, and to her children in fee; and one-third to *C.*, *D.*, *E.*, and *F.* equally among them in life-rent, and to their children equally among them *per stirpes* in fee. He further provided that in case *A.* and *B.* died unmarried, or without issue, or in the event of such issue existing, but afterwards deceasing before attaining the years of majority, or being married, then the two-third shares destined to them and their issue should fall and accrue to *C.*, *D.*, *E.*, and *F.* and their children respectively in life-rent and in fee, and equally among them *per stirpes* as provided with respect to their own shares of the residue. *A.* and *B.* died without issue. *C.* died leaving one child, married, and of age, but who had died without issue before *A.* and *B.*:—

Held, reversing the decision of the Court below, that the representatives of the child of *C.* were entitled to participate in the division of the fee of the two-third shares which were life-rented by *A.* and *B.*

Per LORD GORDON.—There is no difference between the law of *England* and that of *Scotland* in the principles ruling the decision of this case.

APPEAL against an interlocutor of the Second Division of the Court of Session upon a special case. The question to be determined was, whether the Appellant's late husband *James Taylor*, who died on the 9th of June, 1859, and who was the child of *Grace M'Cainsh* or *Taylor*, obtained under the trust settlement of his grand-uncle, Mr. *Andrew Gilbert*, a vested or transmissible interest in a share of two-third parts of his grand-uncle's estate, which were life-rented by the testator's nieces *Cecilia Buchanan Gilbert* and *Jane Gilbert*, and the survivor of them; or whether such two-thirds became on the death of *Jane* (who was the survivor) divisible exclusively among such only of the children of the testator's nieces (*Christian M'Cainsh* and *Margaret M'Cainsh*) as were then living?

Mr. *Andrew Gilbert*, of *York Hill*, the testator (1), died in the

(1) Erskine 3, 8, latter part of s. 20.

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year 1838, leaving a trust-settlement dated 1824, and a supplementary settlement dated the 18th of February, 1829, the latter superseding the former in so far as the division of the residue of his estate was concerned.

The Respondents were—the trustees under this deed of settlement, the parties of the first part (who did not appear in the appeal); and the children of *Christian* and *Margaret M'Cainsh*, the parties of the second part. The Appellant, Mrs. *Jessie Watling* or *Taylor*, was the widow of Mr. *James Taylor*, who died intestate, without issue, at twenty-five years of age. Mrs. *Taylor*, who succeeded to one-half of her husband's estate *jure relictæ*, and the testamentary trustees of his father the said *Benjamin Taylor*, who succeeded to the other half of his estate as next of kin, are the parties of the third part.

The terms of the trust settlement, the facts of the case, and the questions arising thereon, are thus stated by Lord *Gordon* in his opinion:—

The testator here directed his trustees to hold and apply the whole residue of his estate "for behoof of my several nieces after named *and their children* in the following proportions, viz.:—one-third part or share thereof for behoof of *Jane Gilbert* in life-rent, and of the lawful child or children to be procreated of her body equally among them if more than one in fee; one-third part or share thereof for behoof of *Cecilia Buchanan Gilbert* in life-rent and of the lawful child or children to be procreated of her body equally among them if more than one in fee;" and the remaining one-third the testator left for behoof of his nieces the four children of *Colin M'Cainsh* equally among them in life-rent, "and of the lawful child or children procreated or to be procreated of their bodies equally among them *per stirpes* in fee; or one-fourth share of the said third part to the child or children respectively of each of my said nieces equally among them if more than one in fee." The testator then declares that the said provisions made in favour of his said nieces respectively shall be for their life-rent alimentary use allenary "and the fee thereof for the use of their children," and as such the same shall be seclusive of *jus mariti*, and shall not be affectable by creditors. And he provided and appointed that in case either of his nieces, *Jane* and *Cecilia Gilbert*, should die

unmarried, or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority or being married, then and in either of these events the deceaser's share of the residue should fall and accrue to the survivor of them and her lawful child or children in life-rent and fee, and upon the same terms as provided to the predeceaser and her issue. And then there follows the provision under which the question arises which your Lordships are called on to determine. The words used are as follows:—"And in case both of my said nieces, *Jane* and *Cecilia Buchanan Gilbert*, shall die unmarried, or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority, or being married, then and in either of these events their said shares of the residue of my estate shall fall and accrue to my other nieces, the said *Christian, Margaret, Grace*, and *Helen M'Cainsh*, and their children respectively, in life-rent and fee, and equally among them *per stirpes* as provided with respect to their own shares of my estate." I think these latter words are very important with reference to what had been before provided with regard to the shares given to the *M'Cainsh* family, and to the clause which immediately follows, and which is in these words: "And further I hereby provide and appoint that in case any or either of my said nieces, *Christian, Margaret, Grace*, and *Helen M'Cainsh* shall die unmarried, or without leaving lawful children, or in the event of such children existing but afterwards deceasing before attaining the years of majority or being married, then and in either of these events the deceaser's share of the residue of my said estate shall fall and accrue to the survivors or survivor of them, and their children respectively, in life-rent and fee, and equally among them *per stirpes* as aforesaid."

I think these are all the provisions in the deed which it is necessary to advert to, and I shall now shortly refer to the history of the families concerned.

Cecilia Gilbert, the life-rentrix of one of the third shares, died on the 9th of July, 1870, leaving no children, her only child having died in infancy many years before her. On the death of *Cecilia*, her third share fell, in terms of the settlement, to be life-rented by *Jane Gilbert*, who thus became entitled to the life-rent

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of two third shares. *Jane Gilbert* died on the 22nd of March, 1877, also without leaving issue. And the question now arises as to the proportion in which the fee of the two shares which were life-rented by *Jane Gilbert* are now divisible among the representatives of the *M'Cainsh* family.

Christian, Margaret, Grace, and *Helen M'Cainsh,* the life-rentices of the remaining third share of the estate, are all dead. *Helen* (Mrs. *Stewart*) died childless on the 28th of March, 1850. *Christian* (Mrs. *McCulloch*), predeceased the testator, leaving several children. *Margaret* (Mrs. *Maclaren*) died on the 25th of November, 1869, also leaving several children. *Grace* (Mrs. *Taylor*) was survived by two children, *James* and *Colin Taylor*. *Colin* died in pupillarity in 1845. *James Taylor*, as to whose share the present question arises, died intestate on the 9th of June, 1859, twenty-five years of age and married, but without issue. His widow, Mrs. *Jessie Watling* or *Taylor*, succeeded to one half of his estate *jure relictæ*, and the testamentary trustees of his father succeeded to the other half as his next of kin. The children of Mrs. *McCulloch* and Mrs. *Maclaren* claim respectively one half of the fee of the two-thirds of the estate which were life-rented by *Jane Gilbert*, while the representatives of *James Taylor* claim that the said two-thirds should be divided into three portions, and that they should be found entitled to one of those portions, the other two falling to the families respectively of Mrs. *McCulloch* and Mrs. *Maclaren*.

It was admitted in the special case that there was no question as to the disposal of the one-third share of residue originally deputed by the testator to the *M'Cainsh* family, and *Helen M'Cainsh* having died without issue, this one-third share fell to be divided among the relatives of the three families (*viz.*, the *M'Cullochs*, the *Maclarens*, and the *Taylors*) equally *per stirpes*.

On the 3rd of November, 1877, the Second Division, Court of Session, found that the children of *Christian* and *Margaret M'Cainsh*, the parties of the second part, were entitled to the whole of the two-third shares, to the exclusion of Mrs. *Taylor*, and the next of kin of her husband, the parties of the third part (1).

(1) Scotch Cases, 4th Series, vol. v. p. 49.

Thereupon Mrs. *Taylor* presented her appeal to the House,

Mr. *H. Fox Bristowe*, Q.C., and Mr. *A. Young*, appeared for the Appellant, contending that on a sound construction of the supplementary settlement of the testator, *James Taylor*, the Appellant's husband, took a vested or transmissible interest in a share in "that part of the residue of the testator's estate life-rented by *Jane* and *Cecilia Gilbert*." The condition of settlement had been fulfilled by his mother *Grace M'Cainsh* or *Taylor*, by her being married and having a child who reached majority, and that child dying before the life-renters made no difference. *Helen M'Cainsh* had died without issue, and her share of the one-third share originally given for the benefit of the testator's four nieces *M'Cainsh* and their children had without dispute been divided between the second and third parties, the Respondents and Appellant respectively. And accordingly, on the death without issue of *Cecilia Gilbert* and *Jane Gilbert*, the two third parts of the residue to which they and the survivor had been entitled for life, accrued to and became subject to all trusts declared concerning the one-third given to the four *M'Cainsh* nieces. Lord *Colonsay*, in the case of *Carlton* v. *Thompson* (1), gave a very clear enunciation of the law. He said "the postponement of the period of payment till the death of a life-rentrix does not suspend the vesting." The Lord Justice Clerk said, in the Court below, "it never was the intention of the testator that if all the nieces had children, and all the children pre-deceased the life-rentrix, although they all left families, this settlement was to fail altogether, and the funds were to go to the next-of-kin." (2)

The right which *James Taylor* had at the date of his death was a vested right in the life-rented residue; a right which vested in him on his attaining majority. Otherwise, if this view be not entertained, the testator must be held to have died intestate. The condition as to the existence of children of *Jane* or *Cecilia Gilbert* was in no sense a condition personal to *James Taylor;* it was a condition by which (if purified) his right became defeasible, but

(1) Law Rep. 1 H. L., Sc. 241; July 30, 1867; 5 Macph. (H.L.) at p. 154; Scotch Cases, 4th Series, vol. v. at p. 56.

(2) *Scottish Law Reporter*, vol. xv. at p. 15.

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nothing more. The intention of the testator was the real question, and that intention was clearly that the children should take the fee *per stirpes* in the event which had happened, and the Appellant had therefore clearly a right to participate in the distribution of the two shares of residue.

[They relied on, or commented on, *Martin's Trustees* v. *Milliken* (1); *McLay* v. *Borland* (2); *Calder* v. *Dickson* (3); *Matthew* v. *Scott* (4); *Bell* v. *Cheape* (5). See also *M'Laren* on Wills, vol. i. p. 667, *et seq.*]

The Lord Advocate (Rt. Hon. *W. Watson*, Q.C.) and Mr. *E. E. Kay*, Q.C., maintained, for the Respondents, that the contention of the Appellant that *James Taylor* took his mother's share could not be supported. *James Taylor's* interest in the fee of the shares of residue primarily destined to the *Gilbert* family was conditional on the death of both of the Misses *Gilbert* without leaving issue, and *James Taylor* having died before that condition was purified no right to the fee of these shares vested in him, and therefore his representatives had no claim. The testator's manifest desire was that the benefits intended for each of the *Gilbert* and the *M'Cainsh* families should be kept within each family so long as it existed, and it would be repugnant to that desire to hold that the fee of the *Gilbert* share had vested in any member of the *M'Cainsh* family at a time when both the Miss *Gilberts* were alive. The judgment in the Court below was identical with the principle in *Young* v. *Robertson* (6); that principle as stated by Lord *Westbury* was, that "words of survivorship occurring in a settlement or will should be referred to the period appointed by that settlement for the payment or distribution of the subject-matter of the gift," and in Mr. *Gilbert's* settlement the limitations were based on the principle of survivorship, because in each family its members are reciprocally substituted to each other. The Scotch law of wills follows the civil law, therefore the doctrine of the transmissibility of possible interests in *Pinbury* v. *Elkin* (7) did not apply to this case. [They

(1) Dec. 24, 1864; 3 Macph. 326.
(2) Scotch Cases, 4th Series, vol. iii. p. 1124.
(3) June 4, 1842; 4 D. at pp. 1365, 1368.
(4) Feb. 21, 1844; 6 D. 718.
(5) May 21, 1845; 7 D. 614.
(6) 4 Macq. 314, 337.
(7) 1 P. Wms. 563.

commented on *Miller* v. *Miller* (1); *Williams* on Executors, 6th ed. p. 830; *Glendinning* (2); see also *Stair*, 3, 8, 22; *Erskine*, 3, 9, 9; *Bell's* Principles, sect. 1883; *Clelland* v. *Gray* (3); *Mitchell* v. *Mitchell* (4); *Ramsay's Trustees* (5); *Boyd* v. *Denny's Trustees* (6); *King* v. *Withers* (7); *Watson* v. *Marjoribanks* (8).]

LORD GORDON (having stated the facts of the case as above):—

My Lords, I think there is no difference between the law of *England* and that of *Scotland* in the principles ruling the decision of this case. The ruling principle in the construction of all testamentary deeds is the intention of the testator, and that is to be gathered from the words used; and as Lord *Westbury* said in the case of *Young* v. *Robertson* (9), "it is satisfactory when in the legal construction of ordinary words in the English language there is no difference in the view which is taken in the one country and in the other."

The question which has arisen must of course be decided according to the intention of the testator. Now there can be no doubt that the testator intended, in the event which has happened of the two life-rentrices, *Cecilia* and *Jane Gilbert*, dying without children, that the fee of their shares should go to the children of the *M'Cainshes*, and should fall and accrue to them equally among them *per stirpes* as provided with respect to their own shares of his estate. I think it is of importance to observe that the shares were to be divided among the children *per stirpes*. The testator takes care to use these words every time he has occasion to refer to the division of the fee among the children of the *M'Cainsh* nieces; and when he is providing for the fee of the third share which was life-rented by these four nieces, he not only uses the words *per stirpes* but, apparently lest there should be any mistake as to his meaning, he adds "*or one fourth share of the said third part to the child or children respectively of each of my said nieces*

(1) Jan. 19, 1831; 9 S. 295; aff. on appeal, 7 W. & S. 1.
(2) Nov. 30, 1825; 4 S. 237.
(3) June 20, 1839; 1 D. 1031.
(4) March 17, 1865; 3 Macph. 721.
(5) Scotch Cases, 4th Series, vol. iv. p. 243.
(6) *Scottish Law Reporter*, vol. xv. p. 21.
(7) Cas. t. Tal. 117.
(8) Feb. 17, 1837; 15 S. 586.
(9) 4 Macq. 314.

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equally among them if more than one in fee." I think this leaves no room for doubt that the testator intended that the children of *each* niece should take a share of the fee of his estate. No doubt there were personal conditions attached to the children, namely, that they were not to take unless they attained the years of majority, or were married. But as soon as these conditions were fulfilled, I think the children each became possessed of a vested right in the fee. There was no condition that the children should *survive the life-rentrices*, either their own mothers (the *M'Cainshes*) or the *Gilberts*. Of course the payment of the fee was postponed till the death of the life-rentrices; but this did not affect the vesting, which I think took effect on the children attaining majority or being married. It is admitted in the Special Case—and there can be no doubt on the point—that so far as concerns the third share of the residue which was life-rented by the four *M'Cainsh* nieces, the fee vested in the children who attained majority, and this being admitted *quoad* that share, I am at a loss to understand how it should be disputed *quoad* the shares which were life-rented by *Cecilia* and *Jane Gilbert*,—it having been expressly declared by the testator that the fee of these shares should fall and accrue to the children respectively of the *M'Cainshes* "*equally among them per stirpes as provided with respect to their own shares of my estate.*" If the fee of their mother's shares vested in the children on their attaining majority or being married, I think that the shares which were life-rented by the *Gilberts* vested equally on the same event. No doubt there was a contingency in regard to these latter shares, that the *Gilberts* might have left children, and so have defeated the right of fee given to the children of the *M'Cainshes*. But this, I think, with the Lord Justice Clerk, was a mere contingency, and was not a condition suspensive of the vesting. As his Lordship says,

> It is in no respect a proper condition of the legacy. It is only an event before the arrival of which it cannot be known whether the devolving clause has or has not taken effect in favour of the conditional institute. But when that is once ascertained, *James Taylor* simply takes from the date of his majority or marriage; that is to say, it vests, and whether he pre-deceases or survives the life-rentrix is a matter of no moment (1).

I think the Court below had not had its attention directed to

(1) Scotch Cases, 4th Series, vol. v. at p. 57.

what I regard as the important words, that the division of the fee was to be equally among the children of the *M'Cainshes* "*per stirpes*, as provided with respect to their own share of the estate," —at least none of their Lordships make any remarks on these words in the judgments which they delivered. But I think these words solve any difficulty in the case; and that it is not necessary to consider how the case should have been disposed of if these words had not been used; and I would rather not give any opinion on that point.

I think the representatives of *James Taylor* are entitled to participate in the division of the fee of the two third shares which were life-rented by *Jane* and *Cecilia Gilbert*, along with the children of Mrs. *McCulloch* and Mrs. *Maclaren;* and that the Court below should have so found; and I therefore think that the judgment appealed against should be reversed.

LORD CAIRNS, L.C.:—

My Lords, I have had the advantage of considering beforehand the observations which have just been made by my noble and learned friend, and, concurring, as I do entirely, both in the view which he has taken of the case and in the reasons which he has given for that view, I do not think it necessary to add anything to what he has said. The motion therefore which, I think, should be submitted to your Lordships is to reverse the interlocutor of the 3rd of November, 1877, and declare that the parties of the third part as representing the interest of *James Taylor* deceased, are entitled to a share in the division of the two-thirds of the residue life rented by Mrs. *Graham Gilbert*, along with the parties of the second part.

LORD HATHERLEY:—

My Lords, I am entirely of the same opinion.

It is quite plain when you come to look through the whole course of this will that, as my noble and learned friend has pointed out so clearly to your Lordships, the original gift to the nieces and their children *per stirpes* contained nothing whatever to indicate an intention on the part of the testator that it should be a neces-

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sary condition for the children of the nieces to survive their mother before they could obtain any portion of the property. He did impose conditions, and those conditions were that they should live to attain the age of twenty-one or be married. The contrary construction would have this effect, that though one of them should be married and should die afterwards in the lifetime of his mother, and leave a large family, that family would be wholly deprived of all interest in the property because he had not survived his mother. A third condition would therefore be imported into the construction of the will, namely, that the child of a niece should survive his mother. It is quite clear that the postponement of payment until the death of the mother is a necessary consequence of the mother being directed to enjoy her life rent estate and interest; it is a necessary incident of the creation of that life estate and interest. Now, if you look back to the first provision of all which gives it to the mother without any provision about her children surviving her, I think you obtain the clue, if any clue were wanted, to a case which, even apart from that, is not incapable of being argued in the sense in which we are now determining it. And thus, on looking back to the original gift you find that which makes the intention of the testator, as it seems to me, plain and clear in regard to all his gifts.

LORD BLACKBURN:—

My Lords, I quite agree in the judgment proposed. I think that the decision of this House in *Carlton* v. *Thompson* (1) goes a great way towards deciding this case. There, however, the children of Mrs. *O'Reily*, took the fee subject only to a life-rent in their mother, so that any child when born was sure, if living long enough, to come into possession of a portion of the fund. In the present case, Mr. *Taylor's* interest in the fund in dispute was subject not only to the life interest of the two Misses *Gilberts*, but also to a bequest in fee in favour of their children attaining full age or marrying, and until the survivor of the Misses *Gilberts* died, such children might come into existence and attain full age or marry; and so till then, it was uncertain whether Mr. *Taylor*, however long he lived, would ever come into possession. I do not

(1) Law Rep. 1 H. L., Sc. 232.

think however, that does or ought to make any difference. It is in general for the benefit of the objects of the testator's bounty that they should be able to deal with their expectant interests at once; which they can do if their interest is vested, though subject to be divested by the happening of a subsequent event; but which they cannot do if their interests are kept in suspense and contingency until that event has happened. And therefore it is to be presumed that a testator intends the gift he gives to be vested subject to being divested, rather than to remain in suspense. As this is no more than a presumption of his intention, it must yield to anything in the testamentary deed which shews a contrary intention. I think that the language of the instrument in question when closely scanned is such as rather to strengthen the presumption that the testator's intention was in favour of vesting; but I prefer resting my opinion on the ground that there is nothing to rebut that presumption.

Interlocutor of 3rd of November, 1877, *reversed. Declared that the parties of the third part, as representing the interest of James Taylor, deceased, are entitled to a share in the division of the two thirds of the residue life-rented by Mrs. Graham Gilbert along with the parties of the second part; and that the expenses of the Special Case and of this appeal, should be paid out of the trust estate. With this declaration, cause remitted to the Court of Session.*

Lords' Journals. 12th July, 1878.

Agent for Appellant: *William Robertson.*
Agents for Respondents: *Grahames & Wardlaw.*

[HOUSE OF LORDS.]

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DUNBAR'S TRUSTEES AND ANOTHER . . APPELLANTS;
THE BRITISH FISHERIES SOCIETY . . RESPONDENTS.

ET È CONTRA.

Superior and Vassal—Feu-contract, Clause of Relief from Public Burdens—Poor-rates—Statute 8 *&* 9 *Vict. c.* 83.

A feu-contract, dated in 1823, of land feued out to the *British Fisheries Society* for the formation of a harbour and erection of buildings contained this obligation:—"Sir *Benjamin Dunbar*," the Superior, "binds and obliges himself and his foresaids to free and relieve the said society of the whole cess or land-tax, feu-duties, or other duties payable to his, the said Sir *Benjamin Dunbar's*, superiors of the said lands, ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming":—

Held, affirming the decision of the Court below, that the Superior was bound to relieve the vassal of the whole of the poor-rates payable in respect of the lands and buildings erected thereon, imposed under the *Poor Law Amendment Act*, 1845; and that the superior's liability was not limited to the proportion of assessment effeiring to the feu-contract, or to the amount of the feu-duty.

The Superior held liable for the whole assessments though they exceeded the feu duties.

Road Assessments—Statutes 33 *Geo.* 3, *c.* 120; 11 *Geo.* 4, *c.* 102; *and* 23 *&* 24 *Vict. c.* 201.

Held, that the Superior was not bound to relieve the vassal of the road assessments imposed under local Acts in 1830, 1838, and 1860, the burden existing at the date of the feu-contract having been changed by supervenient legislation.

Scott v. *Edmond* (1850; 12 D. 1077) commented on.

APPEAL, and cross appeal, from an interlocutor of the Second Division of the Court of Session.

This action was instituted by the trustees of Sir *George Dunbar*, Baronet, and another; and sought a declarator of liberation from certain obligations, which were contained in feu-contracts dated 1803, 1807, and 1823, between the predecessor of Sir *George Dunbar*, and the *British Fisheries Society*, now incorporated by the *Pulteney Harbour Act*, 1857. The feu-contract of 1823, and

which is now the regulating deed, contained a clause in the following terms:—

"Sir *Benjamin Dunbar* binds and obliges himself and his foresaids to free and relieve the said society of the whole cess or land-tax, feu-duties, or other duties payable to his, the said Sir *Benjamin Dunbar's*, superiors of the said lands, ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby fued, or that may become due and payable for or from the same in all time coming."

The feu-duties were two sums amounting to £169 annually The subjects disponed by these feu-contracts consisted of a considerable space of ground lying on the south side of the water of *Wick* and county *Caithness*, together with a right of moss near the loch of *Hempriggs*, with liberty to quarry stones for the purpose of building on any part thereof, and for the formation of a harbour. The land has been gradually built upon by the society, and by persons to whom the society sub-feued the same, and a considerable village and harbour, now known by the name of *Pulteney* town, has arisen. Since the date of the original feu Sir *Benjamin Dunbar* and his successors have continued to pay ministers' stipend, and schoolmasters' salary, on the understanding that these were all the public burdens which fell under the clauses of relief But in 1876 the society, considering Sir *George Dunbar* under the above clause was bound to relieve them of all poor-rates and road assessments, intimated to the trustees a formal claim for £8739 8*s.* 6*d.*, the total amount (1) already paid by the society, and a right to be relieved in all time coming. The poor-rates were imposed by the Act 8 & 9 Vict. c. 83, s. 45. The road assessments were for maintaining roads in the county of *Caithness*, imposed under certain statutes passed in 1830, 1838, and 1860; and assessment for the *Wick* burgh roads, also imposed under these statutes (2). None of these assessments were in point of fact imposed on any of the subjects in question at the date of

(1) For county of *Caithness* road assessment from 1837 to 1875, £272 10*s.* 9*d.*; for *Wick* burgh road assessment from 1860 to 1875, £831 1*s.* 6*d.*; and for poor-rate from 1842 to 1876, £7635 16*s.* 3*d.*

(2) The charge for road assessments was divided into two parts, because in

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any of the feu-contracts. The poor-rates in 1842 did not amount to quite one pound, but for the year 1875–6 they were upwards of £500, thus if the society's claim was well founded the trustees would lose not only the entire feu-duty, but would have to pay an annual sum of about £400 for the relief of the society besides the sum of £8739. And accordingly Sir *George Dunbar's* trustees raised this action to get rid of this serious charge on the estate; or alternatively to have the extent of the obligation restricted. The questions raised were—

(*a.*) Whether the obligation of relief in the feu-contracts extends to all or any of these assessments. (*b.*) Whether the obligation, assuming it to extend to all or some of these assessments, bound the superiors to do more than relieve the vassals of so much of the assessment as would have been imposed upon the subjects if the feu-duty had been taken as the measure of their annual value? and (*c*) Whether, in any view of the case, the superiors were bound to give relief to a greater extent than the amount of the feu-duty?

The Lord Ordinary (*Curriehill*) found that Sir *George Dunbar's* trustees were liable to relieve the society of the poor-rates and of both the road assessments. On the 19th of December, 1877, the Second Division affirmed this decision so far as the poor-rates were concerned, but reversed it (Lord *Ormidale* dissenting) as to the road assessments (1).

On both parties appealing to the House,

The Lord Advocate (Right Hon. *W. Watson*, Q.C.), and Mr. *A. Graham Murray* (of the Scotch Bar), appeared for Sir *George Dunbar's* trustees, and contended that the decision of the Court below was erroneous as to the poor-rates, and correct as to the road assessments.

AS TO THE POOR-RATES.—The vassal, to obtain relief, must shew that the burden was imposed in virtue of a law which was in

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1860 there was a division made of the liability for the road assessment; certain portions of the feu given off to the society was put under the administration of the burgh of *Wick*, and was liable to be assessed by the burgh for the roads.

(1) Scotch Cases, 4th Series, vol. v. p. 350.

existence at the date of the feu-contracts. The principle laid down in *Scott* v. *Edmond* (1), that "the superior's obligation imposed relief only from burdens imposed, or to be imposed, by virtue of laws then in existence," applied to every instance in which an existing burden was materially altered in its incidence by subsequent legislation. And the *Poor Law Amendment Act*, 1845, if it did not create a new burden, established a new and distinct system for relief of the poor, with a new machinery. The only existing laws which warranted any poor assessment were the Statute 1579, c. 74, and the Proclamation of the Privy Council, August 11, 1692, confirmed by Statute 1698, c. 21; these only sanctioned assessment for the regular poor and the maintenance of vagabonds in prison. But now the poor-rates are applied to a variety of objects (2). Under the old law the assessment might be calculated on the *valued* rent, under the new it must be calculated on the *real* rent. The fact being that the more rental the feuar obtained the more the superior would have to pay in rates, though the feu duty could never be augmented. The Judges in the Court below based their decision on cases entirely ruled by the authority of three cases—*Reid* v. *Williamson* (3), *Lees* v. *Mackinlay* (4), and *Hunter* v. *Chalmers* (5). These cases never came to the House of Lords, and were erroneous. In *Hunter* v. *Chalmers* (5) no claim was made for votes on houses erected since the date of the contract. [They also commented on *Stair*, 2, 3, 46; *Erskine*, 2, 3, 29; *Hope* v. *Speares* (6); *Stevenson* v. *Spiers' Trustees* (7); *Elliot* v. *Lothian* (8).]

ON LIMIT OF LIABILITY.—First, they submitted that if the clause of relief was held to apply to poor-rates, the relief to be demanded could only be that portion of the assessment which effeirs to the estate of superiority in the Appellant's hands. It could not be supposed that the obligation was meant to apply to public burdens calculated, *not* upon the value of the lands in their natural state, but upon the value enhanced by any artificial additions which

(1) June 25, 1850; 12 D. 1077.
(2) Lord *Cairns'* opinion, *post*, p. 1307.
(3) Feb. 16, 1843; 5 D. 644; see Erskine, 3, 4, 9.
(4) Nov. 11, 1857; 20 D. 6.
(5) July 16, 1858; 20 D. 1311, and p. 1317.
(6) July 11, 1837; 15 Shaw, 1288.
(7) Feb. 20, 1858; 20 D. 651.
(8) Dec. 2, 1824; 3 S. 248.

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it might please the vassal to make: see Lord *Deas's* opinion in *Paterson's Trustees* v. *Hunter* (1). Secondly, and alternatively, the superior could not be called upon to pay more than he received in the name of feu duty. The obligation exists *ratione tenuræ* alone, and the true meaning was that the superior merely binds his portion of the common estate—namely, that of superiority; any other view would make the superior not a superior but a debtor. The case of *Stewart* v. *The Duke of Montrose* (2) was a case of teinds, and did not apply to the question here. In *Preston* v. *Magistrates of Edinburgh* there is a very strong opinion of Lord *Moncreiff's* against the principle (3): see also *Nisbit* v. *Lees* (4); *Stewart* v. *M'Callum* (5).

AS TO THE ROAD ASSESSMENTS.—The same principle of law applied to both the county *Caithness* and burgh of *Wick* road assessments: the burdens for each being imposed by the local statutes of 1830, 1838, and 1860. Those Acts imposed not only a much larger burden, but the incidence and object of the existing burden had been completely changed (6). The only burden which could have been in the contemplation of the parties at the date of the feu-contract was an assessment limited to £2 10*s.* per

(1) Dec. 10, 1863; 2 Macph. at p. 240; 36 *Scot. Jur.* 115.

(2) March 27, 1863; 1 Macph. (H.L.) 25; 35 *Scot. Jur.* 420; on app. 4 Macq. 499.

(3) Feb. 4, 1870; 8 Macph. 502.

(4) June 5, 1869; 7 Macph. 881.

(5) Feb. 17, 1870; 8 Macph. (H.L.) 1.

(6) Lord *Ormidale* thus sums up the change in legislation as regards these road assessments:—"At the dates of the feu contracts in question the roads in the county of *Caithness* were regulated as regards assessment and otherwise by the local and personal Act 33 Geo. 3, c. 120, passed in 1793. By that Act the statute-labour system which had previously existed was converted into a money assessment at the rate of 30*s.* per £100 of valued rent, payable by the owners, lessees, and occupiers of land. And besides this enactment it was provided that all cottagers, tradesmen, and others keeping horses should either assist in making and repairing the roads or pay a composition for their labour. A change was made by the Act of 11 Geo. 4, c. 102, passed in 1829, to the effect that (sects. 20 and 21) the conversion or commutation money payable by proprietors and occupiers of lands and heritages should be £2 10*s.* in place of 30*s.* per £100 of valued rent; and power was given to erect turnpikes and levy tolls. And again, by the Act of 1860, power is given (sect. 20) to the road trustees to abolish tolls, and (sects. 24 and 25) real rent is made the basis of assessment on proprietors at the rate of 4½*d.* per pound, with relief to them from their tenants to the extent of one-half.

£100 Scots valuation, whereas now the assessment was calculated on the real rent, which real rent had been increased by buildings voluntarily erected by the feuar, without any corresponding gain to the superior. In *Steuart* v. *Earl of Seafield* (1) it was held that the obligation to relieve of schoolmaster's salary did not apply to school rates imposed under the *Education* (*Scotland*) *Act*, 1872. So here, since 1829 the road assessments were imposed by new and supervenient laws, and therefore the decision of the Court below on this point ought to be affirmed.

Mr. *E. E. Kay*, Q.C., and Mr. *Trayner* (of the Scotch Bar), appeared for the *British Fisheries Society*:—

The object of the superior in making the feu contracts was to encourage the society to build the village, which was to the advantage of the Superior's estate. The superior ought to be held liable to both poor-rates and road assessments, the same principle applied to both; they were old taxes, the mode of collecting and distribution being altered, but this did not make them new burdens imposed by supervenient legislation. This was the essential difference between this case and *Scott* v. *Edmond* (2), as there the taxes were entirely new. The series of authorities beginning with *Reid* v. *Williamson* (3) as to poor-rates were correct, and could not now be upset (4). The relief could not be limited to the amount of poor-rate effeiring to the feu duty: *Paterson's Trustees* v. *Hunter* (5). Nor could there be any limitation to the extent of the liability.

The maintenance of roads in *Scotland* were for a long time, and in *Caithness* down to 1793, secured by exacting labour from the inhabitants, but the pecuniary liability to make good deficiencies rested upon the owners of the land. Accordingly the heritors have always been liable to assessment for roads. The Act of 1793 (33 Geo. 3, c. 120) was a commutation of statute labour into an assessment on the valued rent, but it did not relieve the heritors

(1) Scotch Cases, 4th Series, vol. iii. p. 518.
(2) June 25, 1850; 12 D. 1077.
(3) Feb. 16, 1843; 5 D. 644.
(4) See the Lord Ordinary's note in Court below for these cases, Scotch Cases, 4th Series, vol. v. at p. 354.
(5) Dec. 10, 1863; 2 Macph. 234; 36 *Scot. Jur.* 115.

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of the ultimate liability. The difference was that the burden which might have been imposed in 1823 was 30*s.* per £100 of Scots valuation; from 1829 to 1860 £2 10*s.* per £100 of Scots valuation (1), and from 1860 the burden was 4½*d.*, and not to exceed 9*d.* in the pound on the real rent (2). These were not changes of the burden, but only of its mode and measure. The incidence of the assessment was the same as in 1823, and therefore however much the tax increased, the superior under the clause in the feu contracts was still bound to relieve the vassal. The authorities of *Steuart* v. *Earl of Seafield* (3) and *Stewart* v. *Duke of Montrose* (4) are in favour of this view.

[They also commented on *Hunter* v. *Chalmers* (5); *Cunningham* v. *Cuthbertson* (6); *Hope* v. *Speares* (7); *Stevenson* v. *Spiers' Trustees* (8); *Sprots* v. *Heriots' Hospital* (9); *Wilson* v. *Magistrates of Musselburgh* (10); *Nisbet* v. *Lees* (11).]

Mr. *Trayner*, in reply.]

The following opinions were delivered by the Law Peers:—

LORD CAIRNS, L.C.:—

My Lords, the two duties which are in question in these appeals are the poor-rate and road money. With regard to the first of these the Court of Session have held that the poor-rate comes within the contract of relief—that the poor-rate as it now stands is covered by that contract, and the first appeal challenges that decision. The Court of Session have decided that the road money, for reasons which I shall state, is not covered by this contract; and against that decision the second appeal is brought.

Now, my Lords, the general principle in the law of *Scotland*

(1) Statute 11 Geo. 4, c. 102, imposing an annual assessment upon every proprietor of land.

(2) The *Caithness Roads Act*, 23 & 24 Vict. c. 201.

(3) Scotch Cases, 4th Series, vol. iii. p. 518.

(4) 4 Macq. 499.

(5) July 16, 1858; 20 D. 1311; 30 *Scot. Jur.* 767.

(6) Jan. 27, 1829; Show's Teind Cases, p. 175.

(7) July 11, 1837; 15 S. & D. 1288.

(8) Feb. 20, 1858; 20 D. 651.

(9) May 29, 1829; 7 S. & D. 682.

(10) Feb. 22, 1868; 6 Macph. 483; 40 *Scot. Jur.* 250.

(11) June 15, 1869; 7 Macph. 881; 41 *Scot. Jur.* 502.

regulating these cases is not in dispute, and I think it was stated by Lord *Ormidale* in words as satisfactory as I could desire to use. Lord *Ormidale* says (1):

> It cannot, I think, now be questioned, at least in this Court, that while such an obligation as that in question will give relief from all public burdens exigible or payable at its date, or that might thereafter at any time become exigible or payable by virtue of any law or practice existing at its date, it will not afford relief from public burdens created and imposed for the first time by supervenient laws, that is to say, by laws enacted after the date of the obligation.

That I take to be the general rule, and it was not seriously challenged by the argument at your Lordships' Bar.

But, my Lords, the question remains, what will be the application of this general law? Now, I think it is obvious that the rule from its nature has a double application. There may be a burden existing at the date of the contract, and subsequently the incidence of that burden may be so altered that, although the burden in specie remains the same, the same in name and the same in application, still a change subsequently made by law in the incidence of the burden may be such that it becomes, with reference to a contract of this kind, a new burden and is no longer covered by the contract; or on the other hand, the incidence of the burden may remain the same and yet the application of the burden may be so entirely different that the burden will become, although the same in name, yet a different burden in specie and no longer be covered by the contract.

Now, my Lords, I will first refer to the second of the burdens which is here in question; and that appears to me to be an example of the first of the two changes to which I have alluded. The description of the change which has taken place with regard to the road money is given by the Lord Justice Clerk with much accuracy. The Lord Justice Clerk says (2):

> At the date of the granting of this feu-contract there was a burden imposed, I cannot say upon the land, but upon the occupiers of the land—partly in respect of land, and partly in commutation for personal service. The statute which was in force at the date of the contract was the *Statute Labour Act* for the county of *Caithness*, a local Act which was passed in 1793. The 3rd section of that Act

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(1) Scotch Cases, 4th Series, vol. v. at p. 350.

(2) Scotch Cases, 4th Series, vol. v. at p. 361.

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provides that 'from and after the passing of this Act the whole statute labour of the said county, except as hereinafter provided, shall be converted by an assessment on the valued rent, not exceeding 30s. sterling for each £100 Scots of valuation.' So what was imposed was a limited burden, which could not exceed 30s. for each £100 Scots of valuation. There is then a description of who are to be liable, and that is contained in the 26th clause of the Act:—'For the better explaining who shall be liable in the performance of statute labour or the payment of a composition for the same, be it further enacted and declared, that all heritors in the natural possession of their own lands, and all lessees and occupiers of land, and householders and cottagers, and all labourers (servants hired by the year or half-year, and continuing in service throughout the year, excepted), and all tradesmen, carters, and carriers, and other persons keeping horses for hire or labour, shall be obliged to assist in making or repairing the highways and bridges within the said county or to pay a composition for their labour, in terms of the enactment of this statute.' The assessment thus introduced, in so far as it was a burden on land, was a burden upon those who were in personal occupation of their own land: and in all other respects it was not a burden upon land at all; it was a personal obligation on the parties occupying land or using the roads.

Then the Lord Justice Clerk says (1):

The object of that statute" (that is the Act of 1860) "is to a certain extent the same, viz.: the support of the roads in the county; but the result of the statute is, in the first place, to throw portions of these feus into the burgh which never were in the burgh before; and in the second place, to lay the assessment on the real rent—that is to say, where a subject has been divided and built upon, and the rent enormously increased, the assessment is to be so much in the pound on the real rent, instead of 30s. for every £100 Scots of old valuation as formerly, which was a permanent standard. It is a burden of a different description from that imposed by the Act of 1793, different in its incidence, and wider in its object. I think, therefore, that this branch of the case falls clearly within the principle of *Scott* v. *Edmond* (2). I am of opinion that this is not a burden which falls within that clause of relief—that it is a burden the incidence and amount of which has been entirely altered and increased by subsequent legislation.

My Lords, I entirely concur in that view. The burden remains the same in name. The object of the burden is the same as before, namely to repair the roads, but the incidence of the burden has been so entirely altered that although the same name is given to the tax it has become a tax different in specie. Therefore, my Lords, the burden of the road money, which is the subject of the second appeal, appears to me to have been rightly dealt with by the Court below, and I shall advise your Lordships to dismiss that cross-appeal.

(1) Scotch Cases, 4th Series, vol. v. at p. 361.
(2) June 25, 1850; 12 D. 1077.

Then, my Lords, with regard to the poor-rate, the case of the Appellants in the first appeal with regard to that is stated by themselves in this way. They assert that the *Poor Law Amendment Act* imposed an entirely new burden, and that the difference between the assessment since that Act and the assessment before it was this: they say, that

> Under the old law the assessments could only be applied to, first, the weekly maintenance of the poor, and, secondly, the maintenance of vagabonds in prison; and that under the new law the assessments can be applied to the payment of, first, the salaries of inspectors; secondly, expenses of actions raised or defended by parochial boards; thirdly, erection of poor's houses; fourthly, medical officers; fifthly, subscription to hospitals, dispensaries, and asylums; sixthly, medicines and medical attendance; and, seventhly, education of pauper children.

Now, my Lords, upon that subject, Lord *Ormidale* sums up the statement of his view as to what has been the law established as to the poor-rates in *Scotland*. He says (1):

> In regard to the poor-rates "no serious dispute could be, or indeed was raised, for, in this Court at least, it is no longer an open question, having been the subject of express decision in more than one of the cases cited by the Lord Ordinary (2). In particular, it was held in the case of *Reid* v. *Williamson* (3) that poor-rates leviable prior to the *Poor Law Amendment Act* of 1845 fell under an obligation of relief such as that in the present case, although no such burden was expressly mentioned in it, and that public burdens did not require to be *debita fundi* in order to be comprehended by it. And in more than one of the subsequent cases cited at the debate, and referred to by the Lord Ordinary, it seems to have been held that it makes no difference that the rates were leviable after the passing and in virtue of the *Poor Law Amendment Act* of 1845, although the date of the obligation was long prior, the object of the law being the same as that existing at the date of the obligation, and the rates being due for or in respect of the occupation of land.

(the object and the incidence, therefore, remaining the same)

it appears to have been so held in the cases of *Lees* v. *MacKinlay* (4), *Hunter* v. *Chalmers* (5), *Paterson's Trustees* v. *Hunter* (6), and *Wilson* v. *The Magistrates of Musselburgh* (7), all of which have an important bearing on other points as well. The feu-contract in the case of *Hunter* v. *Chalmers* (5) was dated in 1789, and it contained an obligation by the grantor, the superior, to relieve the grantee,

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(1) Scotch Cases, 4th Series, vol. v. at p. 366.
(2) Scotch Cases, 4th Series, vol. v. at p. 354.
(3) Feb. 16, 1843; 5 D. 644.
(4) Nov. 11, 1857; 20 D. 66; 30 *Scot. Jur.* 10.
(5) July 16, 1858; 20 D. 1311.
(6) Dec. 10, 1863; 2 Macph. 234.
(7) Feb. 22, 1868; 6 Macph. 483; 40 *Scot. Jur.* 250.

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the vassal, 'of all cess, minister's stipend, and whole other public burdens whatever, payable forth or for the lands, of all time bygone and in all time coming'—an obligation in essential particulars similar to that in the present case.

Then Lord *Ormidale* shews that in the case of *Hunter* v. *Chalmers* (1) a defence had been set up upon the same plea as in the present case, and he concludes:

But all of these pleas, and the considerations they were calculated to suggest, were disregarded by the Court, and the superior was found liable in relief. In reference to the plea of non-liability for poor-rates in respect of the *Supervenient Act* of 1845, Lord *Wood*, who delivered the leading opinion, said (2): 'The burden of which relief is demanded is not a new burden introduced by that statute. It is a burden to which the owners of lands, as such, were subject, and which was exigible in respect of the laws existing at the time the feu-contract was entered into, the Act so far as regards the assessment for the support of the poor only regulating the mode of the assessment and pointing out the different ways in which it may be imposed. In all of them the assessment is to be imposed to a greater or less extent on lands and heritages and the owners and occupants thereof, and it is only for that portion of the assessment that relief is here asked.' The other Judges concurred. So far, therefore" (Lord *Ormidale* says) "as poor-rates are here concerned it must be held in this Court that the Pursuer's plea, founded on the *Supervenient Act* of 1845, is untenable.

My Lords, I own I see no reason whatever why your Lordships should dissent from this course of decision. It appears to me that all that has happened in regard to the burden of the poor-rates is exactly that which must happen in regard to any public burden. The progressive course of legislation has pointed out improvements in the mode of the application of that burden, and in the mode of the administration of poor-law relief, but in substance the incidence remains the same, and the object to which the burden is to be applied is the same. I therefore propose to ask your Lordships to affirm the decision of the Court below in the first appeal also; and to dismiss, therefore, both the appeals with costs.

LORD HATHERLEY:—

My Lords, I have come to the same conclusion. I think that the ground for the rule of construction of engagements to relieve of this character, which is found in the judgments given in the Court below, seems to be a reasonable rule, and affords an easy mode of solving questions which otherwise in themselves, with

(1) July 16, 1858; 20 D. 1311. (2) July 16, 1858; 20 D. at p. 1314.

regard to the generality of engagements, might have been extremely difficult. Lord *Gifford*, in adverting to the canon of construction, says (1):

> Before adverting to the special taxes embraced in the conclusions, it will be well to consider if there is any general canon applicable to clauses of relief similar to that contained in the present feu-charter besides the general paramount and governing canon to which I have already referred, that the meaning and intention of the contracting parties, as expressed in the contract, must form the rule and the limit of the liability. In addition to this general rule, I think it may be said that, unless the contrary be very clearly expressed, the obligation will not apply to burdens or taxes imposed by future or supervening laws, which could not be in the prospect or contemplation of the parties at the date of the contract.

I say, my Lords, this seems to me a reasonable construction of that which appears in the first instance to be a very large engagement. It is evidently intended to last for all time, as it is not made dependent upon any duration of interest, which in itself is speedily to come to an end. It is a permanent and lasting obligation entered into by the superior with his vassal when he parts with a portion of that property of which he was owner to that vassal; he considers it desirable, when making his arrangements for so parting with the property, to enter into the engagement in question. Now, from this it would seem that an engagement of this character might be carried to an extent far beyond anything whatever that is reasonable. If you adopted the strictest literal construction of the words that are used, it would seem to point to all time and to be applicable under whatever circumstances the duties may be imposed. But the construction which has been given to such an engagement is this—and a very reasonable one, I think, it is: that it shall apply to all duties which were in existence at the time of the engagement being entered into, and that so long as the incidence of the duty itself be not varied or altered, trifling discrepancies or variations in the mode of raising these duties, or enforcing payment of them, shall not have the effect of removing or diminishing the obligation. Nor shall a change of circumstances in the character of the property itself amount to such abrogation of the obligation entered into.

The only remark which can be made upon the property becoming,

(1) Scotch Cases, 4th Series, vol. v. at p. 370.

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as it is said in this case it does, subject to a burden which is greater than any benefit derived from the feu duty payable by the vassal, is that which was made by Lord *Westbury* in the case of *The Duke of Montrose* v. *Stewart* (1), namely, that the bargain may have turned out a very bad bargain; but it is not the less a bargain on that account. It is plain that the parties contemplated the future, and contemplated a time when the thing would be subject to a certain amount of change, but contemplated at the same time that that would not relieve them from their obligations. The reasonable rule appears to be that what the superior is not to be fixed with under a contract of this description is the taxes imposed by future supervening laws which could not have been in prospect or in the contemplation of the parties at the date of the contract.

That being so, my Lords, I do not follow my noble and learned friend upon the woolsack, by entering into the two heads upon which we have to pass our judgment upon the present occasion, namely, the poor-rates and the road tax. On the one hand, the Court below has thought—and, as it appears to me, most reasonably, that the road tax having a different incidence altogether, being a substitute for statute labour, being a substitute for a burden which fell at the time of the contract in question upon the occupant, and not upon the owner of the property, is not a duty within the contemplation of the parties, but is a duty which has become imposed by a supervening process of legislation, by the several Acts which have been passed (2), and which are referred to in the decision of the learned Judges. These road duties, then, are not to be held to fall within the contemplation of the contracting parties. On the other hand, the poor-rates would seem to have existed at the time of entering into the contract, though the mode of levying them was afterwards varied, and though perhaps in actual amount they were somewhat increased; and on the whole, after due consideration, they have, by various authorities, at all events in the Court below, from which I think your Lordships will not, on account of the reasoning by which the learned Judges support their conclusion, be disposed to depart, been held to fall within this contract for relief between a superior and his vassal.

(1) 4 Macq. at p. 509. (2) See *ante*, at pp. 1302, 1305.

This being so, there remains only one question, I think, to which I have not adverted, namely, the question whether it is right or equitable that any arrangement or apportionment, as it were, should be made when the duty from which the vassal is to be relieved comes to exceed, as it does in this case, the feu-duty payable by the vassal. Should there, then, be any limitation of the engagement, so that on the superior being content to give up the whole of his feu-duties he should be relieved from the rest of his burden which he has undertaken of relieving the vassal from the taxes and imposts which he has undertaken to relieve him from? To limit the engagement in that way would be adding a term to the engagement; it would be simply relieving the superior from a bad bargain, as Lord *Westbury* expressed it. There is nothing to justify the Court in introducing a completely new condition, which was no part of the original contract between the parties, and forming a new engagement by the construction put by the Judges upon the contract, which no words to be found in the contract would bear them out in forming.

I think, therefore, my Lords, that the only conclusion we can come to is that suggested by my noble and learned friend on the woolsack.

LORD BLACKBURN:—

My Lords, I have also come to the conclusion that both the appeals should be dismissed.

I think it is established by a long series of authorities, ending with *Scott* v. *Edmond* (1), that the obligation created by a clause of relief in a feu-charter worded in terms such as these does not apply to burdens or taxes imposed by future or supervening laws. And I agree, for the reasons already stated by the noble and learned Lords who have spoken, that the assessments for the roads are imposed by supervening laws.

But as to the poor-rates, I am compelled to say that the lands were at the time when this charter was executed already burthened with a legal obligation to support the poor. The poor law was at that time and for many years afterwards so worked that this obli-

(1) June 25, 1850; 12 D. 1072.

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gation imposed no practical burthen, or a very slight one. And the Act of 1845, and the practice arising after that Act, has made the burthen a very serious one; but it still remains the same burthen imposed by the old law, though made practically more onerous. I cannot doubt that if those who framed this charter had foreseen what has since happened, they would not have included the poor-rates in the clause. But they did not foresee it; and I cannot advise your Lordships to relieve them from the obligation they have undertaken, though it has turned out a very improvident bargain.

It would be prudent in any such obligations to provide that the superior's liability should not extend beyond the value of his superiority. Such a limitation might be created by words expressing such an intention, but in this case there are no such words; or it might be created by the general law of *Scotland*, but it is admitted that there is no authority for saying that such is the general law.

It is, I think, a very hard case, but the decision below was right, and must be affirmed.

LORD GORDON:—

My Lords, I agree with your Lordships that in this case the interlocutors appealed against must be affirmed, and that the appeals must be dismissed.

Clauses in terms similar to those now in question are not uncommon in feu-charters in *Scotland;* and they have formed the subject of consideration in a series of cases which are well epitomised in the able and exhaustive note of Lord *Curriehill*, the Lord Ordinary in the present case (1).

In every case the Court has to consider the exact meaning of the contract between the parties, but that meaning, where the words are clear and unambiguous, must be gathered from the words of the contract itself. The words here are very wide and general (2). It may well be, and I think there can be little doubt that the parties to the contract did not anticipate that a claim so large in amount as the present would ever arise. But if

(1) Scotch Cases, 4th Series, vol. v. at p. 354. (2) *Ante*, at p. 1299.

the words of the clause, according to their fair interpretation, infer such an obligation as the vassals here contend for, they must receive effect. As Lord *Westbury* well remarked in the case of *The Duke of Montrose* v. *Stewart* (1) in this House:

> It is no answer to say that the liability of the superior under such an obligation may exceed the whole value of the feu duties. This may shew that the contract of the superior was originally improvident, but does not affect the legal construction or validity of the obligation.

But while the clause is to be interpreted according to the true meaning and intention of the parties as expressed in the contract, I agree with Lord *Gifford* that, in addition to this general rule,

> Unless the contrary be very clearly expressed, the obligation will not apply to burdens or taxes imposed by future or supervening laws, which could not be in the prospect or contemplation of the parties at the date of the contract (2).

This principle was given effect to in the case of *Scott* v. *Edmond* (3), which was carefully considered by the whole Court, and the decision in that case has been followed by others, and specially in the recent case of *Steuart* v. *The Earl of Seafield* (4).

The vassals here claim to be relieved of three assessments, or public burdens, which they say fall under the clause of relief in question: first, the county of *Caithness* road assessment; second, the burgh of *Wick* road assessment; and thirdly, poor-rates. The two road assessments may be taken together, as I think the same principle applies to both. I think the poor-rates are in a different position.

There was a difference of opinion in the Court below in regard to the liability of the superior to relieve the vassals of the road assessments, the Lord Ordinary in the Outer House and Lord *Ormidale* in the Inner House being of opinion that the superior was liable in relief, while the Lord Justice Clerk and Lord *Gifford* were of opinion that the superior was not liable. I concur in the views expressed by the Lord Justice Clerk and Lord *Gifford*. The state of the law in regard to the maintenance of roads in the county of *Caithness* at the date of the charters in question is very distinctly set forth in the opinion of Lord *Gifford*.

(1) 4 Macq. at p. 509.
(2) Scotch Cases, 4th Series, vol. v. at p. 370.
(3) June 25, 1850; 12 D. 1072.
(4) Scotch Cases, 4th Series, vol. iii. p. 518.

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Lord Gordon.

I think there can be no doubt that at that date the only assessment which could have been imposed for the maintenance of roads fell to be imposed on the *occupants* merely of land; and that, for such an assessment, the superior would not have been liable in relief. The assessments now in question were imposed in virtue of statutes passed long subsequently, and which for the first time laid *on property* the burden of maintaining roads. I am therefore of opinion that these assessments were burdens imposed by supervening laws, and were not in the prospect or contemplation of the parties at the date of the contract; and that for these the superior is not liable to relieve the vassals.

The question in regard to poor-rates is more difficult. The Court of Session has frequently been called on to consider and decide whether a clause of relief, such as your Lordships have here, covered poor-rates, but the question has never hitherto been brought before your Lordships' House. I have carefully considered the decisions which have been referred to. These are not, of course, binding on your Lordships; but they are very important as shewing the views held on the subject by the Judges, many of them very eminent, who have considered the question. After the best consideration I have been able to give to the subject, I have come to be of opinion that poor-rates do fall within the clause of relief, and that the superior is bound to relieve the vassals thereof. I think that at the date of the charters in question lands or heritages were liable to be assessed for the support of the poor. If such an assessment had been imposed on the lands feued out by the superior prior to the passing of the *Poor Law Amendment Act* in 1845, I have no doubt that the superior would have been bound to relieve his vassals thereof; and that being so, I am of opinion that the *Poor Law Amendment Act* did not impose a new burden on lands, but was truly a continuation of the old law maintaining the old assessments. The purpose of the *Poor Law Amendment Act* of 1845 is shewn by its preamble, which is that

> It is expedient that the laws relating to the relief of the poor in *Scotland* should be *amended*, and that provision should be made for the better administration thereof.

The new law, in my view, was merely an amendment of the old. Its purpose and effect were the same as the old, namely, the

making provision for the maintenance of the poor. No doubt the *Poor Law Amendment Act* introduced a new system of management, and much greater expense has been incurred in the administration of the law, which has to be provided for by larger assessments, but I am of opinion that that does not make any difference on the question to be decided. I have no doubt that under the old law the superior would have been liable in relief of any assessment which might have been imposed, and I am of opinion that he is equally liable in relief of the assessment imposed on the owner of the property under the new and existing law. There is no doubt that this is a very great hardship on the superior, but that is a consideration which your Lordships cannot take into account. The obligation was voluntarily undertaken in words which cover the burden in question, and your Lordships have no alternative but to give it effect.

It was strongly contended on behalf of the superior that the obligation of relief must be limited to the amount of the feu duty. But there is no limitation in the contract, which undertakes to relieve the vassals of the *whole* of the burdens specified in the clause,

> And other public burdens due and exigible out of the lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming.

I am of opinion, therefore, that the superior is liable in relief of the *whole* assessments, even though these may, as they unfortunately do, exceed the amount of the feu duty.

I think, therefore, that both appeals should be dismissed; and that the interlocutors appealed against should be affirmed.

In each appeal interlocutor appealed from affirmed; and appeals dismissed with costs.

Lords' Journals, 12th July, 1878.

Agents for *Dunbar's* Trustees and another: *Connell, Hope, & Spens.*

Agent for the *British Fisheries Society: W. A. Loch.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1878 July 9.

BORJESSON, AND WRIGHT his Mandatory Appellants;
CARLBERG and Others . . . . . Respondents.
(FIRST APPEAL.)

Ship, Foreign—Arrestment at Sea—Practice.

The diligence of arrestment is inapplicable to a ship sailing on her voyage; and force must not be used to bring the vessel back to port.

An arrestment *ad fundandam jurisdictionem* was used on a vessel lying in *Glasgow Harbour*. A second warrant of arrestment on dependence of the action was then given to the messenger-at-arms to execute; but he finding that the vessel had sailed on her voyage, pursued her on board a steam-tug with thirty men, and overtaking her some way down the *Clyde*, within the jurisdiction of the Scotch Courts, as she was approaching the high seas, seized her, and brought her back to port, and dismantled her:—

Held, affirming the decision of the Court below, that the execution of the arrestment was illegal, and therefore should be recalled.

APPEAL from an interlocutor of the Court of Session, recalling certain arrestments laid on the barque *Edgar Cecil*. On the 3rd of October, 1877, the Swedish vessel *Edgar Cecil* was arrested *ad fundandam jurisdictionem* at the instance of the Appellants, *Borjesson*, and his mandatory *James Wright;* the object being to found jurisdiction against the Respondents, *Carlberg* and others, as representing the owners, foreigners. *B. O. Borjesson*, who had acted as captain for some time previously, had claims against the owners for wages and alleged advances, besides being part owner. On the 4th of October *Borjesson* obtained a warrant to arrest the vessel on the dependence of the action. The warrant was indorsed, according to Scotch practice, with a concurrence by the Lord Ordinary on the bills "for putting the warrant into all due and legal execution, so far as regards maritime subjects;" and "warrant to dismantle arrested vessels if necessary." On the 5th of October the vessel, in fulfilment of a charterparty dated the 11th of September, 1877, sailed in ballast for *America*. The messenger-at-arms, who desired to execute the warrant, finding the vessel had started on her voyage, and that she did not touch at *Greenock*, followed in a steam-tug with thirty men, and, overhauling her as she was passing down the *Clyde*, off *Skelmorlie*—

being still within the jurisdiction of the Scotch Courts—he forced the crew to put her about, and brought her into the harbour of *Greenock*, where he dismantled her by removing her sails and steering apparatus. The Respondents thereupon petitioned the Court of Session for recall of the arrestments. The First Division, on the 21st of November, 1877, held that the execution of the arrestment was illegal (1).

On appeal to the House,

The Lord Advocate (Rt. Hon. *W. Watson*, Q.C.), and Mr. *E. C. Clarkson*, for the Appellants, contended that the warrant of arrestment had not been illegally executed. The objections of the Respondents were that the warrant authorized the messenger only to detain, and not to stop or bring back the ship; that it was incompetent to arrest a vessel that has actually set out on her voyage; that the arrestments were used nimiously and oppressively. But the ship was arrested within the jurisdiction of the Court of *Scotland*. When the officer overtook the vessel and fixed the form of arrestment on the mast, the act of arrestment was at an end. Certainly the legal effect of the arrestment was to fix the vessel arrested at the spot where the arrestment was used. But this would not have hindered the vessel from proceeding to *America*. And, therefore, whether the vessel be within a harbour, lying at anchor, or proceeding down a river, the law allows the dismantling. The officer could not have dismantled her at the spot where she was arrested; there she would have been at the mercy of the wind and weather, and a danger to other ships. It was clear, then, that he was bound to take the vessel to a place of safety before carrying out his warrant to dismantle, and that he did. This was not a capture, but a necessary act involved in the dismantling of the vessel, which was distinctly warranted.

It was another frequent practice to arrest a vessel riding at anchor in a roadstead to which she has put back for safety, for shelter, or repair; yet such vessels had undoubtedly commenced their voyage. There was no principle or authority which would uphold the objection that the arrestment was illegal because the vessel was in motion.

(1) Scotch Cases, 4th Series, vol. v. p. 188; and *Scottish Law Reporter*, vol. xv. pp. 112, 114.

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The arrestments were not nimious or oppressive. In *Kennedy* v. *M'Kinnon* (1), which was cited against the Appellants, the messenger having arrested the vessel took her from the safest anchorage she could have, and ran her on a sandbank. In *Petersen* v. *M'Lean & Hope* (2) no arrestment had been issued when the messenger boarded the vessel, and there, too, she was anchored in a safe place: here the vessel was rapidly sailing down the *Clyde* to the open sea. In *Inglis* v. *Smith* (3) the messenger moved the vessel and dismantled her, and he was not held to have acted illegally.

[LORD CAIRNS, L.C.:—Could a steamer with a valuable cargo and a large number of passengers be stopped on her voyage and brought back?]

Undoubtedly vessels have frequently been arrested anchored in the *Downs*.

Mr. *Benjamin*, Q.C., with him Mr. *Jameson* (of the Scotch bar), contended for the Respondents, that the arrestment was executed in an illegal manner. This was a case of Practice, and the House of Lords had over and over again decided that in such cases they would not review the decision of the Court below. The vessel could not be touched even just outside the harbour if she was sailing on her voyage. What would become of the insurance? Lord *Mure* laid down exactly the general principle of law, when he said "the arrestment of a vessel when she has actually sailed on her voyage, as this one had done, is an illegal proceeding" (4). It appeared to be settled by the cases of *Kennedy* v. *M'Kinnon* (1), and *Petersen* v. *M'Lean & Hope* (2), that a messenger is not entitled with no other authority than a warrant of arrestment, even to remove a vessel from her moorings in a roadstead and bring her into a harbour, much less would he be entitled to bring a vessel back to harbour after having sailed many miles on an outward voyage, as here; indeed the diligence of arrestment from its nature is totally inapplicable to a ship sailing on her voyage. If it was necessary and proper that a vessel, while thus on a voyage, should be seized

(1) Dec. 13, 1821; 1 S. 198.
(2) Jan. 14, 1868; 6 Macph. 218.
(3) Jan. 26, 1867; 5 Macph. 320.
(4) *Scottish Law Reporter*, vol. xv. at p. 114.

and brought back, such a proceeding would require a warrant to that effect granted upon a special application to the Judge Ordinary of the place or the Court of Session.

On the other hand a warrant of arrestment and a warrant of concurrence with regard to maritime subjects are granted on any summons, as a matter of course, because the effect of an execution of arrestment is only to keep the thing arrested *in statu quo* until the action is decided. The contention of the Appellants was that the officer was bound to take the vessel to a place of safety, in order to carry out his warrant to dismantle; that was an extraordinary inference to draw. The messenger should have served the warrant and left it to the captain to proceed on his voyage at his peril. The whole proceedings were nimious and oppressive, because several actions were depending in the Courts in *Sweden*, where the disputes could with greater facility have been settled, but the object of the Appellants was to get the vessel away from the owner in charge, *Carlberg:* see *Stair*, 3, 1, 24, and *Bell's* Com. 7th Ed. vol. ii. p. 63.

Mr. *E. C. Clarkson*, in reply.

LORD CAIRNS, L.C.:—

My Lords, the first of these appeals raises a question which is purely and simply a question of practice. It is a question of what is the extent of the authority of a warrant of the Courts of *Scotland*. My Lords, upon that subject your Lordships are in the habit of paying in the first instance the greatest possible attention to the opinion of the Court itself. There is no source from which your Lordships can better find what is the practice of the Court than from the Judges of the Court, who best know the effect of their warrant and the mode in which it should be executed.

My Lords, there is no doubt that the ship, *Edgar Cecil*, was upon a foreign voyage, and was passing down the *Clyde*, and had reached that part of the *Clyde* where she was rapidly approaching, though she had not actually arrived at, the open sea. Under these circumstances those who desired to execute the warrant pursued the ship in a steam-tug from *Greenock*, with a number of men on board, overhauled the ship, insisted upon her crew putting

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her about, and returned with her to the harbour at *Greenock*. My Lords, I should be unwilling actually to decide (it does not seem to me to be necessary in this case to decide) whether, the ship having sailed upon her voyage and being in motion, it was competent to those who desired to execute the warrant to go on board her at all to serve the warrant of arrestment there. I rather infer from the language of some of the learned Judges in the Court of Session (1), that they doubted whether the ship could be even served with the arrestment after she had thus commenced her voyage and was in motion; but, be that as it may, it appears to me that the very utmost that could be done would be that those who thus got on board of her might affect the master, whatever might be the consequence of it, with the knowledge that an arrestment was there and was served there on board the ship. But I can find no authority whatever which would justify them in turning the ship about and bringing her back into port.

The warrant speaks of dismantling the ship if necessary. I asked the learned counsel for the Appellants what he conceived to be the object of dismantling; and he said very naturally, and very properly, as it seemed to me, that it was to prevent the removal of the ship. That implies that a ship is found in port in a state of quiescence, and the dismantling takes place to prevent her being put into a state of motion. The idea that a ship in motion in a part which, for the purpose of navigation, is as much exposed to the perils of the sea as if it were the high sea, could be dismantled there, is out of the question, and I find no authority in the warrant, nor in the law, which authorizes a ship to be brought back, it may be a great number of miles, into port, for the purpose of being there dismantled. My Lords, I can see no reason for differing from the judgment of the Court of Session.

LORD HATHERLEY:—

My Lords, I concur in the view which has just been expressed in this case by my noble and learned friend. I am induced to come to this conclusion in the first instance mainly because this is a question arising upon a point of practice of the Courts in *Scotland*,

(1) Scotch Cases, 4th Series, vol. iv. at p. 191, and *Scot. Law Rep.* vol xv. at p. 114.

founded upon that extensive knowledge which the Judges must necessarily possess of the practice of their own Courts. Under these circumstances your Lordships' House has frequently expressed its great reluctance to interfere with such decisions of the Court below; for it is only when it is very manifest that the judgment is contrary to practice that your Lordship will undertake to reverse it. My Lords, in this case instead of there being any authority which has decided that the messenger would be authorized in bringing the ship back to the port where he might proceed to dismantle her, it appears to me that the only authorities which have been cited to the Court at all were authorities which looked very much the other way, or where the consequences which ensued when this course was pursued were disastrous; and that disaster would be the result of this course nobody can doubt. It is quite enough for us to say that we are not concluding that question in any way—there are modes of proceeding against persons who, neglecting or despising the orders of the Court, proceed to act contrary to the orders of which they have had notice through means of a messenger. It may be that the messenger may have the power by nailing the warrant to the mast, which is one mode of serving the orders of arrest, of fixing thereby the person who has the charge of the vessel, and who ventures afterwards to remove it upon his own authority, with a heavy responsibility; and there may be means of arriving at justice if any injustice be done in the course of such procedure. At all events, it is quite clear that what has been done, if allowed to proceed, might lead to the gravest consequences, and so far from being justified by precedent, as I have already said, the only precedent which has been relied upon is one which has a very strong leaning the other way.

LORD O'HAGAN, LORD BLACKBURN, and LORD GORDON concurred.

Interlocutor appealed from affirmed, and appeal dismissed with costs,

Lords' Journals, 9th July, 1878.

Agents for Appellants: *Hollams, Son, & Coward.*
Agents for Respondents: *Simson, Wakeford, & Simson.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1878 *June* 9.

BORJESSON, Messrs. WRIGHT & CO., and Others . . . . . } Appellants;

CARLBERG and Others . . . . . Respondents.

(SECOND APPEAL.)

Ship, Foreign—Re-arrestments held invalid.

A ship on her voyage having been arrested by a warrant on dependence of an action, and brought back by force into harbour, the arrestment was recalled as illegally executed. Other arrestments were then used against the vessel by parties acting in concert with the original arresters:—

Held, affirming the decision of the Court below, that the second arrestments must also be recalled.

THIS action arose out of the previous case (1). The ship *Edgar Cecil* having been brought back to *Greenock* harbour under the circumstances detailed above, other arrestments were used by *B. O. Borjessen*, Messrs. *Wright & Co.*, *Lars Borjesson*, and *Anders Borjesson*, against the vessel. The Respondents petitioned the Court of Session to recall these arrestments, the previous arrestment by the same parties having been recalled. On the 22nd of December, 1877, the First Division found that those acting in the second arrestments were in concert with those who were parties to the first arrestment, the execution of which had been declared by the Court illegal, and that therefore the second arrestments must also be recalled (2).

On the appeal to the House the parties were represented by the same counsel as in the previous appeal.

Their Lordships, without calling on the Respondents' counsel, delivered the following opinions:—

Lord Cairns, L.C.:—

My Lords, I think it is clear that this appeal cannot be sustained. If those who executed the second arrestments were acting in concert with those who were parties to the first arrestment, their authority

(1) *Ante*, p. 1316. (2) Scotch Cases, 4th Series, vol. v. p. 390.

cannot be maintained. What was done by the first Appellant was illegal in bringing the property into a position in which he thought he could effectuate the arrestment for his own purposes by the second proceeding. The first proceeding was by the namesake of the present Appellants, who was authorized by them to act for them, and it is perfectly clear that the second proceeding and the first were for one and the same object, and that these persons of the same name thus acted together. That, my Lords, was the view taken by the Court of Session of the relative position of the parties, and I think it will be found to be entirely correct (1). I therefore move your Lordships that this appeal also be dismissed with costs.

LORD HATHERLEY:—I quite concur.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 9th July, 1878.

Agents for Appellants: *Hollams, Son, & Coward.*
Agents for Respondents: *Simson, Wakeford, & Simson.*

(1) The Lord President said:—"If some entirely independent third party had arrested the ship on the dependence of an action between him and the master, the question would have been quite different. But there is here no independent third party. One of the arrestments is at the instance of Mr. *Borjesson*, by whose illegal act the ship was actually brought back, and who therefore in making this arrestment is trying to benefit by his former illegal proceeding. Mr. *Wright* was Mr. *Borjesson's* mandatory, therefore he is equally with *Borjesson* an actor in the illegal proceeding. Messrs. *Lars* and *Anders Borjesson* are among that class of owners who authorized Mr. *B. O. Borjesson* to take proceedings to have *Carlberg* removed, and the ship detained till they have carried through the accounting, and they affirm that authority now. It was therefore for the sake of *Lars* and *Anders Borjesson*, as well as for *B. O. Borjesson*, that that illegal proceeding was carried out. They are all in combination. They are all working for a common end. I cannot find it possible to dissociate *Lars* and *Anders Borjesson* from the others; they all have a common purpose, as disclosed by the answers to the petition, and the authority is shewn by those answers. These arrestments are for the purpose of recovering sums of money advanced to *Carlberg* for the ship, and to make him account for his intromissions with them. It is therefore impossible to say that we have independent third parties. None of them are more entitled than *B. O. Borjesson* was to use arrestments on the ship being accidentally brought back to *Greenock*, and therefore I am for recalling all the arrestments.

[HOUSE OF LORDS.]

H. L. (Sc.) 1878 June 27.

MACKENZIE . . . . . APPELLANT;

BANKES . . . . . RESPONDENT.

Common Rights of Riparian Proprietors—Separate Lakes connected by Narrow and Shallow Channel.

Action for declarator of common right in the fishing, fowling, and boating in, over, and on an inland loch or lake. The Pursuer was a riparian owner on *Loch F.*, which was separated from *Loch D.* by a narrow and shallow channel (which was not a river), and more materially divided by a causeway of loose stones erected more than forty years ago. He claimed that *Loch F.* and *Loch D.* were one. The Defender owned all the land lying round *Loch D.* Both proprietors held their lands *cum lacubus* merely:—

Held, affirming the decision of the Court below, Lord *Blackburn* doubting, that *Loch D.* was a separate and distinct loch, and that therefore the Pursuer had no right therein. The grounds of decision being the difference of name, the configuration of the ground, and the existence of the causeway.

IN 1876 Mr. *Mackenzie* of *Kernsary*, in the parish of *Gairloch*, and county of *Ross*, the Appellant in this case, raised an action of declarator and damages against the Respondent, Mr. *Bankes* of *Letterewe*, in the same parish and county, concluding *inter alia* for a declarator that "the Pursuer (who and the Defender are the only proprietors whose lands lie around and border on the loch after-mentioned), has, along with the Defender, a joint right or common property in the loch called *Fionn* loch, lying in the said parish, and particularly in that part of the same sometimes called the *Dubh* loch, and a joint right of boating, fowling, fishing, and exercising all other rights in or over the said loch, and particularly in or over the said part thereof."

The question involved was simply one of fact, namely, whether *Loch Dubh* formed part of *Loch Fionn*, or was a separate and distinct loch. There was no question as to the titles of the parties, both holding their lands *cum lacubus* merely. The properties of the Appellant and Respondent adjoin each other, and lie around and border on a large stretch of water, extending from north-west to south-east some eight miles in length. Mr. *Mackenzie's* lands enclose the water on the west and south sides extending along a

distance of about four miles, while the property of Mr. *Bankes* completely surrounds the south-east end, and also runs along its north side, and they are the only riparian proprietors. Towards the south-eastern extremity the expanse of water is suddenly contracted by a promontory projecting from each side; and its width at this point at ordinary levels is from 90 to 100 yards. The two sheets of water being divided by a narrow low-lying ridge from which the bed of each basin slopes down gradually to a great depth. This ridge is covered with water about knee deep, and was long used as a drift way, or ford, between the opposite shores. The sheet of water to the south-east of the ridge, about a mile in length, and a third of a mile in breadth, and which is surrounded by precipitous mountains, goes by the name of *Dubh* loch. The sheet of water to the north-west of the ridge, about six miles in extent, is called *Fionn* loch. Mr. *Mackenzie's* contention is that the whole stretch of water is one loch called *Fionn* loch, and that the narrowing of the water at the south-east end which forms *Dubh* loch did not make them separate lochs. *Dubh* loch is surrounded completely, except where the narrow and shallow water connects it with *Fionn* loch by Mr. *Bankes's* land, and he claims that *Dubh* loch is a separate and distinct loch, and he being the sole riparian proprietor on its banks, has all the rights of fishing, fowling, and boating thereon. He relies on the difference of name and the natural configuration of the ground, the two sheets of water being completely divided by the low-lying ridge over which the surplus waters of *Dubh* loch flow into *Fionn* loch. In 1829 a causeway of rough stones, through which the water could filter, and which stood about a foot above the ordinary state of the water, was erected across the waterway in the line of the ridge or "phait." It was built by a person who was the tenant of the land immediately adjacent on the north side of the ridge or "phait;" and who was at the same time tenant of other lands a few miles distant on the south bank of *Loch Fionn* under a predecessor in title of the Appellant. No objection was ever made to this erection. Since 1845 the Appellant has fished, fowled, and boated over and on *Loch Dubh* without challenge. But in 1876 he was prevented from fishing on *Dubh* loch by Mr. *Bankes's* order, who explained that he had allowed the fishing to go on, not as a right, but out of neighbourliness, but that now there was a probability of the deer on the hills around *Loch Dubh*

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being frightened by the fishers. Mr. *Mackenzie* then raised this action for declarator, and pleaded, (1) the Pursuer has, in virtue of his titles, a right of common property in the *Fionn* loch, and a joint right to use the same in common with the Defender; (2) at least, the Pursuer's title, and the possession, use, and enjoyment of the said loch by him and his predecessors and authors from time immemorial, or forty years and upwards, confer upon him the said rights; (3) the said sheet of water, sometimes called the *Dubh* loch, being a part of the said *Fionn* loch, the Pursuer has the same rights of common property in the same as in the rest of the said loch.

The pleas in defence maintained by Mr. *Bankes* were:—

(3) That as the Pursuer has no land bordering on the piece of water in dispute, he has no right in it, even assuming it to be a part of *Loch Fionn;* (4) that the erection of the causeway referred to on the record and in the proof, at the *Narrows*, immediately below the water in dispute, is a barrier by which the Pursuer is excluded; and (5) that the water in dispute is not a part of the *Fionn* loch, but a separate loch.

On the 4th of June, 1877, the Lord Ordinary (Lord *Craighill*) pronounced the following interlocutor:

Finds as matters of fact, (1) that the lands of *Inverewe*, belonging to the Defender, border upon and surround the natural sheet known as the *Fionn* loch, in the parish of *Gairloch*, and county *Ross;* (2) that neither the titles of the Pursuer, nor those of the Defender, contain an express grant of that loch or of any part thereof, or of any right therein, but in the case of each loch are specified as pertinents, which are conveyed along with the lands; (3) that there has not on the part of the Pursuer or of the Defender, and their respective predecessors, been exclusive possession of said loch, or of any part of it, or of any right therein, for forty years, or for time immemorial; (4) that the said loch is between seven and eight miles long; that the Pursuer's lands of *Inverewe* and *Kernsary* stretch along the south shore for a distance of between three and four miles; and that the portion of these lands farthest up the loch, which is that nearest to the piece of water in dispute, represented by the Pursuer to be the head of said loch, and by the Defender to be a separate loch, known by the name of the *Dubh* loch, is more than three miles distant from that locality; (5) that the said piece of water which is in dispute is not a separate loch, but is a part of the said *Fionn* loch; and (6) that the Pursuer has since the end of October, 1876, been forcibly prevented by the Defender from sailing on, fishing in, or otherwise using the said piece of water in dispute; but that special damage from this exclusion has not been proved, and nominal damages are, in the circumstances, all which the Pursuer now seeks to recover from the Defender. In the third place, finds, as matters of law, the facts being as above set forth; (1) that the Pursuer has, along

with the Defender, a joint right or common property in the said *Fionn* loch, including that part thereof sometimes called the *Dubh* loch, and a joint right of boating, fowling, fishing, and exercising all other rights on, in, or over the said loch including as aforesaid; and that the Defender is liable in damages to the Pursuer for excluding the latter from the said part of the *Fionn* loch: Therefore, repels the defences; and finds and declares, decerns and ordains in terms of the first, second, and third conclusions of the summons: further, ordains the Defender to make payment to the Pursuer of the sum of 5*s.* as the nominal damages, which are all that are now sought to be recovered in the terms of the fifth conclusion, and decerns.

Against this decision Mr. *Bankes* reclaimed; and the Second Division on the 30th of November, 1877, altered (Lord *Gifford* doubting) the Lord Ordinary's interlocutor, by finding that Mr. *Mackenzie* "is not proprietor of any land abutting on *Dubh* loch, and has no right of common property or common interest therein: find that the *Dubh* loch is not part of *Fionn* loch, but is a distinct and separate loch; therefore assoilzie the Defender (Mr. *Bankes*) from the conclusion of the summons," with expenses (1).

On appeal to the House,

Mr. *Rodwell*, Q.C., and Mr. *Mackintosh* (of the Scotch Bar), contended for the Appellant:—

Neither of the parties here claim to have an express grant, and therefore their position was simply that of riparian proprietors. The *Dubh* loch was nothing more than an upper portion of *Loch Fionn*, and the Appellant being a riparian owner on *Loch Fionn*, had a common right to fish, fowl, and boat over and on the whole surface of the lake: and this right, where there was no express grant, riparian owners on lochs had, no matter how small their land was; though they are bound to draw their nets on their own land: see Stair, 2, 3, 73; Bankton, 2, 3, 12; Erskine, 2, 6, 3, and 3, 3, 56; Bell's Prin. ss. 651–1111; *Menzies* v. *Macdonald, Loch Rannoch Case* (2); *Scott* v. *Napier, St. Mary's Loch Case* (3); also *Cochrane* v. *Lord Minto* (4). There was little evidence regarding possession prior to 1845, but since then, that is for thirty years, the Appellant

(1) Scotch Cases, 4th Series, vol. v. p. 278.

(2) Mar. 10, 1854; 16 D. 827; 26 *Scot. Jur.* 385; aff. 2 Macq. 463; 19 D. (H.L.) 1.

(3) June 11, 1869; 7 Macph. H. L. at pp. 35, 36, 40, and 74.

(4) 6 Paton, 139, and Interlocutors of the Lord Justice Clerk, *post*, p. 1342; and Cases on Appeal, House of Lords' Printed Papers.

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had exercised all his rights, and when possession goes as far back as evidence reaches it was a fair inference that the earlier possession was the same as the latter. The loch was one unbroken sheet of water; the water being narrower and shallower at one part could not be held to cause a division. There was no river between the two sheets of water at the narrow point; if there had been, of course the case would have been different.

The nomenclature of highland lochs was a matter of no significance: lochs which are beyond controversy *one* are often called by different names: *Loch Ness* and *Loch Dochfour*, *Loch Maree*, and *Loch Talladale*, and *Loch Nan-Taag*. The artificial causeway did not prevent exercise of the Appellant's right of fishing, fowling, and boating over the whole loch from beginning to end; the whole of the evidence was that a boat could at any time pass: prescription did not apply. [The further argument on behalf of the Appellants is fully commented on in the opinions of the Law Peers.]

The Lord Advocate (Rt. Hon. *W. Watson*), (with him Mr. *Benjamin*, Q.C.), maintained for the Respondent that the lakes were separate. This was borne out by the fact of the low-lying ridge between *Loch Dubh* and *Loch Fionn;* they were called by separate names, and they were later on divided, without objection, by a physical barrier raised on a natural barrier, over which there was occasional transport, but no right of way. All the land round *Loch Dubh* belonged to Mr. *Bankes*, therefore, it being a separate loch, Mr. *Mackenzie* had no right in connection with *Loch Dubh* at all. Before 1876, the Appellants were not aware of Mr. *Mackenzie's* claiming a common right; and, at all events, up to 1845 that claim was not made. In *St. Mary's Loch Case* (1) circumstances were different. [They also commented on *Cochrane* v. *Lord Minto* (2).]

Mr. *Rodwell*, Q.C., in reply.

Their Lordships delivered the following opinions:—

LORD HATHERLEY:—

My Lords, the case submitted to your Lordships' decision in the present appeal is one which depends, as it appears to me, entirely upon a matter of fact. We have had a very able argu-

(1) June 11, 1869; 7 Macph. H. L. p. 35. (2) 6 Paton, 139; see also *post*, at p. 1342.

ment, both upon the facts and upon the law of this case. Without disparaging the other arguments, we are, I may say, particularly indebted to Mr. *Mackintosh* for the very able argument which he brought before us.

My Lords, the law seems now to be completely settled, and the cases which have been referred to may, I think, be disposed of at once, because the decision must, as I have said, turn upon the facts of the particular case. The case of *Scott* v. *Napier* (1), and still more the former case of *Cochrane* v. *Lord Minto* (2), or those two cases put together, will pretty well elucidate all that need be said upon the law of the case; and I assume that if the Appellant in the present case had been enabled to prove that the two pieces of water, which have acquired by one means or other the names of *Loch Fionn* and *Loch Dubh* respectively, were within the principle of the Scotch law by which it appears that the proprietors bordering on a lake have, in regard to certain matters which I shall mention afterwards, a common right in respect of such occupation along the banks of the given lake, he would have succeeded. If the Appellant could have proved that these two sheets of water formed one lake, so as to bring himself within the decisions which have already been given with respect to lakes of that character, then I apprehend he ought to succeed in this appeal.

I was very much struck by the clear way in which Mr. *Mackintosh*, at the outset of his argument, said that he proposed to argue the question. Mr. *Mackintosh* having established from text-writers and from decided cases that there is a common right in a lake, he asked, What is that common right to be, and what is the unity of the lake which gives rise to that common right, and not only gives rise to it, but limits its extent? He said, and I confess, my Lords, I followed him and agreed with him in that view, "it must be with reference to the character of the right which is to be exercised." Now, in the present case the right is a common right on the piece of water, which the Appellant says is only one lake, the common right of boating, fowling, and fishing. One can understand how it is that that common right has grown up. A person proceeding from property of his own to fowl or to fish upon a lake could not be conveniently arrested the moment he arrived at the

(1) June 11, 1869; 7 Macph. H. L. 35. (2) July 5, 1815; 6 Paton, 139.

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medium filum aquæ ex adverso of his land, or the moment he traversed the boundaries, which might be drawn on the extreme north and south, or on the extreme east and west of his land. The case of *Cotterell* v. *Lord Minto* (1) was cited. I need not dwell long upon that case, for it has no application to the present; but when it was fully looked into, and the papers searched with reference to the previous opinion of the Lord Ordinary (2), with which the noble Lords who decided the case in this House said that they agreed—I say, when that was looked into, a rule seems to have been there laid down approaching to some degree of definiteness with reference to the right of a proprietor to the *solum* up to the *medium filum* on the one hand, and on the other hand what I am now speaking of, the common right of fowling and fishing over the whole lake. I assume, therefore, that Mr. *Mackenzie* has clearly made out his right to fowl and fish, starting from his own grounds on *Loch Fionn*, until such time as he may be arrested in that right by its termination owing to the termination of the site—that is to say, the lake upon which he intends to exercise his right in question.

Now, my Lords, I apprehend, if it should be found that there exists between two pieces of water a barrier to the exercise of the right, having regard to the objects of the right—a barrier such as Mr. *Rodwell* in his argument in reply put thus: Suppose there were a waterfall which a boat could not shoot, owing to its quantity of water or the height of the fall, then, although a waterway in one sense exists—that is to say, there is a stream of water—yet it would be idle to say that the right could be carried further than up to that waterfall. So, again, if you arrive at a distinct and clear river, flowing for some distance (the exact limits it would be very difficult to define), then the rights would arise of the riparian proprietors along the river; and nobody in his senses would say that because it was a continuous navigable river, therefore the two pieces of water were one and the same for the purpose of exercising this right of fowling and fishing. Those would be cases in which it would be very difficult to define the limits.

My Lords, after the difference of opinion in the Court below on the part of the Lord Ordinary, and perhaps to a certain extent,

(1) July 5, 1815; 6 Paton, 139; see also Cases on Appeal, House of Lords' Printed Papers.

(2) See *post*, at p. 1342.

although not to the full extent, on the part of Lord *Gifford*, as contrasted with the opinion of the Lord Justice Clerk and Lord *Ormidale* (1), it would be idle for any one to contend that the present case was not one of nicety. Certainly it is one of great nicety, but I think when sifted and examined it will be found to reduce itself to a case in which the right extending over *Loch Fionn* could not, according to the principles of Scotch law, be rightly and necessarily extended over *Loch Dubh;* in other words, I do not think the Appellant has made out that case which he was bound to make out in order to establish the right which he claims.

Now, in order to trace this matter to the commencement with reference to the information we have before us, it will be necessary to refer to the evidence of the old witnesses upon the subject. But first I will state generally the conclusion at which I have arrived from the whole mass of evidence. Upon that evidence my mind comes to this conclusion, that anterior to 1828 (since which more than forty-eight years have elapsed) when a solid sort of causeway or path was constructed at this narrow part which separates and divides the two sheets of water, anterior to that time there was, whatever it may be called, whether it be called a phait, or whether it be called a hump, or whatever name be used to describe it, there was a considerable rise in the ground or bed of that piece of water, which rise beginning in *Loch Fionn* may be traced to a considerable extent in *Loch Dubh;* and this occurred at a narrow point where the sheet of water is wonderfully nipped and narrowed—nipped into a space so small that had it continued so it might well perhaps have been called a river. At that very point there always was a remarkable shallow; and I think I may state how shallow it was according to the evidence of the oldest witnesses. At the lowest time you could not, perhaps, have traversed the shallow entirely dry-footed to its full extent, but a portion of it was dry in the middle, and there was more or less a space of very low water on one side and on the other of that ridge. At the lowest times when there was not a large amount of flood water in the lakes the depth at that place was, I think one witness says, a foot, not more. In the ordinary average times throughout the year you would have it as high as the small of the leg. There were times, one witness

(1) Scotch Cases, 4th Series, vol. v. at p. 281.

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says, when it came up to his middle; and one of the witnesses who resided for a great many years on the spot says, that at least twenty times he had to go round the lake This rising phait or hump is proved (Mr. *Buchanan* expressly speaks to this) to have on the one side, namely, the *Loch Dubh* side, what the witness calls a "pot," a deep descent, the ground descending fifty or sixty feet from this shallow very rapidly to this deep pot or bowl; and there is something of the same kind on the other side, that is to say, on the *Loch Fionn* side. It therefore represents in itself a considerable division between the two pieces of water.

But, my Lords, as I said before, this must be considered in reference to the exercise of this right of fowling and fishing, and the question is, whether any of those reasons which occasion such a common right exist in this case. Undoubtedly we are left with very slender evidence as to anything done or attempted to be done by boats previous to the erection of the causeway forty-eight years ago; but even anterior to the erection of the causeway, that is to say, at a time when it was not intended that persons should not cross this barrier, the case was very rare that any boat could pass or did pass by means of the water, there being no instance of any boat having got over this obstacle except by the process of the persons in the boat getting out of it and hauling it over at the most convenient spot for such a hauling process. It appears to me that that is in itself enough to conclude the case, coupled with the configuration of the spot in question, the obstacle occurring in the midst of this narrow part, which has undoubtedly given rise to the two names being applied to the two pieces of water by all the country side. It has been well urged at the Bar that you might meet with cases where two names are given to different parts of an entire open piece of water; but when you find the two things combined, when you find that the two sheets of water are called by two different names, and that that is a very reasonable thing to happen when the only mode of communication from the one to the other before this causeway was constructed was by the process of hauling a boat in the way I have described, those two things taken together go a long way to shew that there was no legal necessity for the extension of the right of fowling and fishing over the sheet of water which could not be reached by the ordinary

process which a fowler or the fisher would use. Not only is that argument as to the absence of legal necessity for the right very strong in itself, but, as a matter of fact, the non-user of *Loch Dubh* by the persons dwelling on *Loch Fionn* alone for any other purposes is a very strong adjunct as helping us to arrive at a conclusion. Tried, as Mr. *Mackintosh* suggested, by the nature of the right to be exercised, when that right seems to be arrested and stopped by means of that shallow portion of the loch, it goes a long way to shew that the law of *Scotland* with reference to a common right of fowling and fishing would not have applied where a proprietor could not conveniently have used his boat for the purpose.

Now, my Lords, if that was so before the erection of this barrier, then let us see how the erection of the barrier acted. I quite agree that Mr. *Mackenzie's* right, if he had any, was not lost by the erection of that barrier forty-eight years ago under the circumstances and by the person who performed that act, who seems to have been the author of both these proprietors who are now contending before you. He erected it for the convenience apparently of bringing his sheep over dry-footed at certain seasons. He thought it desirable to augment this natural barrier, and to raise this artificial barrier in order to make such a causeway as could be traversed by the sheep at certain seasons when most required, and generally dry-footed, or nearly so. The object was to suit his pastural business. Now let us see how that bears upon the question which is raised by Mr. *Mackenzie*. I do not say that it proves an acquiescence on his part to submit to an exclusion of his right supposing the right to have existed. Considering all the evidence we have before us as to the object for which the causeway was made, and all that took place afterwards in the way of pulling down the barrier occasionally, though not for the purpose of asserting on the one hand, or denying on the other, any right, I do not think that all that would in itself have amounted to a legal conclusion against the Appellant; but it does shew that all those who might have raised the same litigation as he has raised upon the present occasion, did not care in the least degree about the erection of this sheep path, in fact, probably preferred that it should be erected for the accommodation which it rendered to

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their tenants. Be that as it may, no question was ever raised; and can it be believed that if the authors of Mr. *Mackenzie* had thought or dreamt of exercising any right of pursuing their fowling or fishing up to the upper loch they would have quietly sanctioned the erection for a totally different purpose of a barrier which would totally frustrate their object; that, seeing the obstacle which existed already, they would have allowed a still greater obstacle to be placed in their way. But that was not the case; this erection interfered with nothing that they ever thought of doing; and it being no interference with any rights which they wished to enjoy.

[His Lordship having gone through the evidence of the oldest witnesses, proceeded as follows:—] I think after referring to these witnesses, I need read no more to shew what was the exact nature of this barrier anterior to the erection of the artificial barrier. It appears to have been this—people crossed by wading or by stilts—at the lowest times one could cross by taking off one's shoes and stockings, and sometimes the water went up to the knee, but not often. No boat ever went across it.

I will not go into matters upon which there is no dispute between the parties, but there is abundant evidence to shew that after the time of the formation of this artificial barrier nobody ever crossed it by means of a boat except by the process of getting out of the boat, lifting her up and drawing her to the place where it was most convenient to cross the artificial barrier. I do not say that there was no water there, there might be about three or four inches, sometimes more or sometimes less of water underneath her, but there was not enough to float her into the upper sheet of water.

That being so, I do not consider it necessary to go into more detail upon the whole nature of the case. I have carefully read the Lord Ordinary's judgment (1), and I have carefully read the judgment of Lord *Gifford*, and Lord *Gifford*, although he uses rather a remarkable expression as to what it would have given him pleasure to find (2) nevertheless does not on the whole dissent from the judgment of the Lord Justice Clerk and Lord *Ormidale*.

(1) Scotch Cases, 4th Series, vol. v. at p. 280.

(2) Scotch Cases, 4th Series, vol. v. at p. 288.

I think that the broad view of the case is that upon which our decision may be rested beyond a possibility of cavil or dispute. Taking the broad view of the case, you have here two sheets of water which undoubtedly occupy two different "pots" or deep hollows. Between these two different deep hollows a ridge has been formed, either originally at the time when the hollows were formed, or by process of denudation and detrition bringing down the gravel and stones from the mountains and the like. At all events, there is this high ridge or barrier shelving off on the one side and on the other into the deeper parts of *Loch Fionn* on the one hand and *Loch Dubh* on the other. This ridge or barrier could not be crossed, and never was crossed, by any person for the purpose of exercising the rights of fowling and fishing which are said to belong in common to the proprietors of land on the shores of the lake, and those rights were never exercised up to the time of the artificial barrier being placed there. That artificial barrier was raised without any kind of dissent or murmur on the part of any human being, and it is almost incredible that persons who were entitled to exercise rights, and who desired to exercise those rights, of fowling and fishing on the upper sheet of water, which would be interfered with by that artificial barrier, should not have objected to it. It may be that they never thought it was worth their while to do so then, and it may be that the increased number of travellers in that locality has made it more desirable to a proprietor upon the one sheet of water to see how far he can extend his rights; but, at all events, there being that nip of the land, there being this natural conformation of the bed of the water underneath the surface, there being these two large hollows or chasms on the one side and on the other, there being this natural barrier between the two lakes (for so I must call them) in the centre, unpassed by boats up to the time when the artificial barrier was erected, the artificial barrier having been erected which made it still more impassible, and that having been done without objection by anybody, I must confess that if I were considering this matter as a juryman I should come to the conclusion that *Dubh* loch was a separate loch, and that the barrier between it and *Loch Fionn* was never passed by sailors, or by sportsmen, or by fishermen, without lifting the boat across the barrier in question. *Loch*

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Dubh is, by its natural configuration and conformation underneath separated from *Loch Fionn*, and that being the case, it follows, of course, that the claim by the Appellant over *Loch Dubh* cannot be sustained.

Therefore I advise your Lordships that the interlocutor complained of be affirmed, and this appeal dismissed with costs.

LORD SELBORNE:—

My Lords, in the view which I take of this case, it is not one of any serious difficulty.

In one of the wildest parts of *Rosshire*, there are two basins of water, closely connected together, as to which the question is, whether, for the purpose of determining the rights of the riparian proprietors, they ought to be regarded as two lakes, or as one.

So far as reputation, or the testimony of the common sense and understanding of the people of the district goes, it is in favour of the proposition, that they are two lakes; for the upper of them is, and always has been, commonly and popularly called "*Loch Dubh*" (or the "*Black Lake*"), and the lower "*Loch Fionn*" (or the "*White Lake*"). The natural formation of the two basins appear to me to justify this common and popular understanding. *Loch Dubh*, the upper and smaller basin, receiving in proportion to its size a considerably larger rainfall than the lower, is surrounded, except on one side, by precipitous mountains falling steeply to the water, and is very deep. But on one side, that towards *Loch Fionn*, the two sheets of water are divided by a low-lying spit or ridge of land, from which the bed of each basin slopes down gradually. Over the neck or middle of this ridge the surplus waters of *Loch Dubh* flow into *Loch Fionn*, and, at the narrowest point of that outlet (which is about fifty feet long and ninety-four yards wide), the water of overflow, in its natural state, when neither swollen by excessive rains nor reduced by excessive drought, is stated in the Appellants' evidence to have been usually about knee-deep. From this point, on the other side, the bed of *Loch Fionn* also sinks gradually, until it likewise attains a great depth. Across this narrowest part of the outlet there appears always to have been a ford or passage, for men and animals, passible except in times of spate or flood; and I see no reason to doubt the correctness of a

statement made by one of the Respondents' witnesses, that this ford or passage has long been (as it is now), used by the country people, as part of a drift-way between *Loch Broom* and *Gairloch*. In 1829 a causeway of rough stones, rising a little above the level of the water in its ordinary state, and constituting a visible separation between the upper and the lower basin, was erected, partly on the low bank on each side (then belonging to predecessors in title of the Respondent), and from thence across the water-way, in the line of the accustomed passage or ford. This was done by a person, who was then tenant of the land immediately adjacent, on the north side of the ford, and who was at the same time tenant of other land a few miles distant, on the south bank of *Loch Fionn*, under a predecessor in title of the Appellant. It was argued by the Appellants' counsel that the motive for this erection was to enable sheep to be more safely and conveniently moved from this tenant's land on the one side, to his land on the other, by means of the drift-way crossing the ford, and that both landlords ought to be presumed to have known, and to have acquiesced in, what was so done. Taking this to be so, it would appear to follow, that all the landowners under whom the Appellant and the Respondent now claim, concurred or acquiesced in 1829 in an act, by which any passage of boats from the lower to the upper waters, if practicable before, would become permanently obstructed, although they might still be drawn or lifted over the obstruction, or forced through any gap which might exist or be made in it, by the use of proper means; and this state of things has existed ever since 1829, and still continues to exist. In point of fact, it does not appear that any boat ever did pass from the lower to the upper basin, or that any use was ever made of the waters of the upper basin for fowling or fishing from this surface, before this causeway was erected. A coble is said to have been kept, at or near the passage, at one particular time before 1827, and persons are said to have been sometimes ferried across in it; but if this had been done above the outlet, or in the narrowest part where the ford was, the witness (who was called for the Appellant) would doubtless have said so, and I therefore think myself bound to infer the contrary. That witness (*McIntyre*), an educated man, and a seaman by profession, said that on three several occasions, in summer and autumn, when

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he waded over the passage there "was plenty of water to float a boat;" but he explained that he meant an empty flat-bottomed boat, with a light draught of water, of about eight or nine inches, and that he "did not say that a loaded boat, or a keeled boat, would pass there." Other witnesses for the Appellant also spoke of the possibility of taking a boat through, at the ordinary height of the water in the ford, but they do not appear to me to have added anything of importance to this testimony of *McIntyre*, and I think it is better to lay no stress upon anything less favourable to the Appellant's case which was said by any witness for the Respondent.

There always was, and must have been, some current downwards, through this passage, from the upper to the lower basin, but the witnesses for the Appellant, who speak of the state of things before 1829, say that neither that current, nor any difference of level between the two sheets of water, was then ordinarily perceptible to the eye, although since the erection of the causeway it appears generally to have been so.

It is to these facts that the law of *Scotland* with respect to the rights of riparian proprietors in inland lakes has now to be applied. Under titles such as those by which both the competitors in the present case hold (and when nothing turns upon any evidence of exclusive possession), the entire lake, if surrounded by the land of a single proprietor, belongs to that proprietor as a "pertinent" of his land. If there are more riparian proprietors than one, it belongs, "rateably," to them all. So far as relates to the *solum* or *fundus* of the lake, it is considered to belong in severalty to the several riparian proprietors, if more than one; the space enclosed by lines drawn from the boundaries of each property *usque ad medium filum aquæ* being deemed appurtenant to the land of that proprietor, exactly as in the common case of a river. But, for reasons which may be presumed to be founded in part, if not wholly, on the irregularity of configuration, frequent in lakes, this *ex adverso* rule is not extended, by the law of *Scotland*, to these rights (such as boating, fishing, and fowling), which are exercised in, or upon the surface of, lake waters. These are to be enjoyed over the whole water space, by all the riparian proprietors in common, subject (if need be), to judicial regulation.

In this case, it follows necessarily, from these principles, that the whole *fundus* or *solum* of *Loch Dubh*, and of the outlet from that piece of water, including the site of the causeway, belongs to the Respondent alone, by whose land it is entirely surrounded; and I am of opinion that the Court of Session was also right in holding, that to the Respondent, and to him alone, belong all other rights of a sole riparian proprietor, in and over the same piece of water.

These two bodies of water are naturally distinct; no part of the waters of *Loch Fionn* mixing with those of *Loch Dubh;* while those of *Loch Dubh* overflow into *Loch Fionn*, though with little apparent current or difference of level.

"There is" (in the words of the Appellant's witness *Rogerson*), "a considerable barrier to the mass of the water passing from the one loch to the other." The fact, that the channel of overflow is too short and immediate to be called a river, and the possibility of drawing or working some kinds of boats over or through it, are not, in my mind, of any material importance, nor am I sure that they would be so, even if I were satisfied, (which, upon the evidence, I am not,) that the transit of ordinary boats from the lower to the upper loch would, before the causeway was made, have been practicable in the usual state of the water at all seasons of the year, without the use of any extraordinary means for that purpose. No imaginary line of partition has, in this case, to be drawn upon any water-surface; the demarcation has been made by nature, in a manner at once scientifically and practically intelligible. It has been practically and popularly understood and acted upon, as a natural and real boundary between two lakes; as is evident, both from the local nomenclature, and from the history and use of the "phait," or ford, and of the causeway. To infer from the authorities as to the right of several riparian proprietors to use the same lake in common, that such a common right is to be extended to every upper sheet of water accessible by any continuous water communication from a lake, unless such water communication has the proper character of a river, appears to me to be an arbitrary corollary from a reasonable rule, founded on the peculiar natural conditions of lakes, which the reasons of that rule do not at all require or justify.

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I agree, therefore, with my noble and learned friend, now on the woolsack, that this appeal should be dismissed.

LORD BLACKBURN :—

My Lords, after the argument, particularly the very able and clear exposition given by Mr. *Mackintosh* on the one side and the Lord Advocate on the other, I think I may say there is no dispute now as to the law of *Scotland* so far as it comes in question in the present case. Where there is a lake with different proprietors on each side, the titles may be such as to shew that one has the exclusive possession; and even where the titles do not shew it there may be evidence of possession for such a long time as to shew either that there has been exclusive possession by one proprietor or that there has been "promiscuous possession," to adopt the phrase which has been used and which appears to be an expressive one; in either case that possession would explain and supplement a title which was not in itself enough to determine it. But such possession may be negatived, as in the case, which though rare has happened, that there had been unity of possession within the last forty years, and that the then proprietors had acquired different portions of the lake, or of its margin, from the same person without their titles having anything to define or bind their rights. The law of *Scotland* seems to be established thus far, that as regards the rights which from their nature can only be enjoyed in severalty, such as dredging for marl where marl exists in the bed of a lake, or taking coals where coals exist underneath a lake, those rights are to be enjoyed in severalty. The question how far the Courts in *Scotland* exercise a power of severing and dividing the rights so as to take away the right of taking marl and so on under certain parts of the lake, does not arise in this case.

But there are some rights which, owing to the nature of a lake, cannot conveniently be enjoyed in severalty. Those who are proprietors upon the shores of a lake may boat upon it and may catch fish or shoot wild fowl upon it. If you were to apply the same rule as would be applied in a river, a man who had a few yards of land upon the edge of a lake, should have attached to it a right to have what I may call a long projecting promontory of water, perhaps miles long, tacked on to his land, and he

would, of course, have a right to say, I myself will sail up and down this long narrow strip of land covered with water. I will fish and I will shoot there. I will take care not to go over the boundary on either side, and nobody shall come into my long narrow strip. This would be very inconvenient in practice. Now I think I may say, that the law of *Scotland* has established this: in the absence of anything in a title to shew the contrary (for there may be many things in a title to shew the contrary), and in the absence of exclusive possession for a sufficient period (for there may be exclusive possession of the whole or part), in the absence of those things the common *primâ facie* right of those who are riparian proprietors on a loch is to enjoy such rights in common—the cases which had been cited seem to shew that; but, with the one exception which I will mention presently, the point was not absolutely necessary to be decided.

The earliest case seems to have been that between the *Menzies* of *Weem* and *Robertson* of *Strowan* (1). There is no report shewing upon what principle the case was decided; at least I have not been able to see one—but in 1797 the Court of Session did divide *Loch Rannoch* between them, declaring that *Robertson* of *Strowan* and *Menzies* of *Weem* had the right of boating and fishing on the whole loch in common. How they got at it does not appear, but that was the decision undoubtedly.

The next case was the case of *Cochrane* v. *Earl of Minto* (2). In that case there was a small lake in *Roxburghshire*, which had been entirely the property of one person—his barony surrounded the whole, and unquestionably and undoubtedly he had the whole lake. He sold a part of it to Admiral *Elliot*, the uncle of the Earl of *Minto;* he seems to have sold part of it also to Mr. *Cochrane*. Then there came a quarrel. The real quarrel that arose between them was as to the right of dredging for marl. It was found that the marl at the bottom of the lake was of great value. Admiral *Elliot* claimed to take marl under the whole of the lake. The other rights which were claimed as to fishing and fowling, and so forth, were not of any great consequence, and the question as to them did not substantially arise. But, as I under-

(1) See *Menzies* v. *Macdonald*, March 10th, 1854; 16 D. at p. 828; affi. 2 Macq. 463, and 19 D (H.L.) 1.

(2) July 5, 1815; 6 Paton, 139.

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stand the history of the case, the parties seem to have had first a declarator as to the nature of their rights, and afterwards an interdict to prevent the dredging of marl, and then the two processes were united. On referring to the case laid before this House on the appeal in that case in 1815, it appears that the Lord Justice Clerk (the Lord Ordinary) made this interlocutor, 11th March, 1808:

> Having considered this condescendence, answers, and whole process: in respect that the titles of neither party contain or give them any right to the loch in question, finds that it must be held in law to be common to both: Therefore, finds the facts condescended on by Admiral *Elliot* not relevant, and refuses a proof; and in the declarator, decerns and declares in terms of the second alternative of the summons, viz., that each party's interest in the loch shall extend *ex adverso* of his own lands from the shore to the middle of the loch, and that each party may dig marle within his own division: Finds the right of fishing and fowling to be common to both over the whole loch: Finds that the run of water from the said loch to the burn of *Wool* must remain as at present for the use of the Pursuer's mill of *Askirk*; and decerns, reserving to the parties to apply to the Sheriff to have poles driven into the loch to serve as a march between them.

It seems to me, my Lords, that the Lord Justice Clerk must have had in his mind the decision which was come to in the case of *Robertson* of *Strowan*, as to *Loch Rannoch*, and must have applied it in that case, and said, The surface rights which are not conveniently enjoyable unless you enjoy them jointly, are to be enjoyed jointly; that is what I understand the Lord Justice Clerk to say. The two conjoint processes came before the Court of Session, and then there was a question as to whether the effect of an excambion had not been such as to exclude *Cochrane* from the lake altogether. Admiral *Elliot* said that the effect of the excambion was that he got the whole, and that *Cochrane* was not a riparian proprietor at all. The Court thought that Admiral *Elliot* should have everything, *Cochrane* not being a riparian proprietor. The case came up to this House upon that, and Lord *Redesdale*, in advising the House, says (1), "I think the Lord Justice Clerk was originally right. I think the excambion has not that effect. I think that *Cochrane* is a riparian proprietor, although a small one. In the order of this House, altering the interlocutor, the right to take the marl, which is the real controversy, is mentioned. Nothing is said as to the boating, fishing,

(1) 6 Paton, at p. 145.

and fowling in the order. But I think, looking at what had been the interlocutor of the Lord Ordinary in 1808, and the language of Lord *Redesdale*, the effect of this judgment of the House of Lords in 1815 is to say, that as to these surface rights, which from their nature could not conveniently be exercised except jointly over the whole loch, the *primâ facie* and natural presumption was that they were to be exercised jointly over the whole lake.

Then, my Lords, came the two cases which have been so much mentioned; the first of which was the case of *Menzies* v. *Macdonald* (1). I agree with what the Lord Advocate said, that there having been a basis settled as long ago as 1797, when *Robertson* of *Strowan* was declared to have his right as regards the shore of the loch, and a joint right of boating over the whole loch, that was a fixed matter for them to start with, and consequently they did not decide upon the common right. Lord *Curriehill* evidently thought that it was a common right to be exercised by each of the proprietors in common, as the Lord Justice Clerk in 1808 had previously held, but I do not think that that was decided.

In the case of *Scott* v. *Napier* (2) which followed, Lord *Curriehill* laid down the law which was very much adopted by this House. The Lord Advocate was justified in pointing out that Lord *Curriehill* proceeds to shew that there had been promiscuous possession for the last forty years, and that the case might have been decided on the ground that there was promiscuous possession, but I do not think it was decided upon that ground. I think it was decided upon the ground that what the Lord Justice Clerk actually laid down in 1818 was the law, and obviously it is a very convenient law. I wish to guard against being supposed to express an opinion on a matter which does not arise. There may well be a bay, unquestionably a part of a larger loch, and yet so land-locked and surrounded by a gentleman's policy, that he and his predecessors had for more than forty years, in fact, have had exclusive possession of that bay; at present I do not say anything how the law would be; but I should be very sorry to be supposed

(1) March 10, 1854; 16 D. 827; 26 *Scot. Jur.* 385; affirmed June 10, 1856, 2 Macq. 463, and 19 D (H.L.) 1.

(2) June 11, 1869; 7 Macph. (H.L.) 35.

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to say that in such a case as that, if exclusive possession for forty years was proved, proof of promiscuous possession in other parts of the main loch would necessarily deprive the exclusive possession of part of effect.

I think I am not saying too much, after having heard the exceedingly able argument, in saying that the established rule since 1815, now more than sixty years, is as I have stated; and it is a sensible and convenient rule, and one that ought not to be disturbed rashly.

Taking that to be so, my Lords, I think I am right in saying that if the Lord Ordinary was right in his facts, he was right in his judgment. He finds that the lands of the Pursuer (Appellant) and the Defender (Respondent) "border upon and surround the natural sheet of water known as the *Fionn* loch, in the parish of *Gairloch*, and county of *Ross*. That neither the titles of the Pursuer nor those of the Defender contain an express grant of that loch, or of any part thereof, or of any right therein, but in the case of each, lochs are specified as pertinents, which are conveyed along with the lands." That is not, I think, disputed to be the state of the title. "That there has not, on the part of the Pursuer, or of the Defender, and their respective predecessors, been exclusive possession of said loch, or of any part of it, or of any right therein, for forty years." Now, as to that, I think I may say that that is borne out by the facts which appear on the evidence. The nature of the lochs was such, they being in a very wild part of the hills, far from any gentleman's house, that until recently nobody cared about either boating or fishing on the lochs. There is evidence that some smugglers from some of the islands once had a boat there; and it appears that a shepherd at one time kept a coble which he used for the purpose of crossing from side to side. But neither the proprietors nor anybody else ever boated for pleasure; nor did either of them care about the fishing at that time. I dare say the smugglers and the shepherd caught a trout for themselves now and then; but neither of the proprietors cared about it at all; and consequently there was no occasion for either of them to trouble themselves about such exercise of their rights. The rights were left as the law gave them to them, without anything being done to affect them.

Now in 1828, more than forty years before the present action, a causeway was made across at the narrow strait, to enable the sheep to cross from one side of the loch to the other, and no doubt that causeway would be an impediment; I do not say that it would absolutely hinder, but it would be an impediment to any person boating from the one end of the sheet of water to the other. If it had been allowed to continue an impediment without anybody exercising the right for forty years from that time, I should say that that was strong evidence to shew that, whether such was the intention or not, everybody had been in fact kept out of *Loch Dubh* for forty years, and a prescription would have run in favour of Mr. *Bankes*. But the wind and waves very soon made breaches in it, and I think it is shewn very clearly that in 1845, only sixteen years after this erection had been put up, the then tenants of Mr. *Mackenzie* did, in fact, go in a boat from end to end notwithstanding this impediment. They seem to have purchased a boat for the purpose, and to have had the boat carried over land to the loch. It is very likely that in old times some of the lairds may have gone fishing there, but as far as the evidence shews, that occasion in 1845 seems really to have been the first occasion of the exercise of boating or fishing on the loch on the part of either proprietor. I think the evidence is clear that they did then go up into *Loch Dubh*. I do not see how it was possible to go in a boat through the narrow without passing through a gap in the causeway or over it; but it had so little effect upon the mind of the witness, Mr. *Blackburn*, who was one of the tenants of the fishery, who was there, and who says he is positively certain that he fished up to the bottom of the steep hill at the end of the *Black* loch, that he did not remember until he looked at the photograph there were particular projecting points at all, nor does he remember any erection nor any difficulty in passing the boat from one end of the loch to the other. I think that shews that he must have gone over at that time without much difficulty. If he had been obliged to get out of the boat and wade, or even land, I think he would have remembered it well enough. But then I do not know what the state of the water was at that time, and it is proved that there is a rise and fall, and that there is a difference of several feet between

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high and low water. Consequently, if at the time he went the water was a few inches higher than usual, his going over without getting out of the boat would not prove much. However, this evidence shews that at this time they did go there and exercise the right on the part of Mr. *Mackenzie*, and from that time there has been an exercise of right on the part of Mr. *Mackenzie* and his tenants, coming down to the present day. Now, my Lords, assuming what is the main question in the present case, that they had a right, then this exercise of it was quite enough to prevent any prescription on the part of Mr. *Bankes* or his authors running against them. On the other hand, if they had not got the right, the user is not enough to give them a title.

Therefore, my Lords, we come back in my view to see what the state of things was in 1828, before the formation of this artificial causeway. I do not attribute the same degree of weight that my noble and learned friend who spoke just before me has done, to the putting of the causeway there, as shewing what was the right before the causeway was constructed. I think it shews that neither Mr. *Mackenzie's* author nor Mr. *Bankes'* author cared much for boating there. It was not until fourteen or fifteen years afterwards that boating for sporting purposes seems to have been used at all. I do not, for my own part, feel that I would attribute much weight, therefore, to that circumstance.

Then comes the controverted part of the Lord Ordinary's finding (1). He finds, "That the said piece of water which is in dispute is not a separate loch, but is a part of the said *Fionn* loch; and, That the Pursuer has, since the end of October, 1876, been forcibly prevented by the Defender from sailing on, fishing in, or otherwise using the said piece of water in dispute; but that special damage from this exclusion has not been proved, and nominal damages are, in the circumstances, all which the Pursuer now seeks to recover from the Defender." And then he finds, "That the Pursuer has, along with the Defender, a joint right or common property in the said *Fionn* loch" (what the effect of that would be in the extraordinary and improbable event of the discovery of there being marl at the bottom of *Loch Fionn*, I do not know,—he does not say)—"including that part thereof sometimes called *Dubh*

(1) See *ante*, p. 1326.

loch, and a joint right of boating, fowling, fishing, and exercising all other rights on, in, or over the said loch, including as aforesaid." I think if his fact is a fact, that the *Dubh* loch is not a separate loch, but a part of the *Fionn* loch, his conclusion in law is perfectly right.

Now, my Lords, comes the real question on which the decision of this appeal in my mind depends, and it is one of fact, Is the *Dubh* loch a separate loch or not, and what should be the guide of those who are to decide that question of fact? A good deal has been said about its being called by a separate name; that, I think, is not a matter to be despised, or thrown out of view, because calling a place by a separate name indicates that those people who are about in the country and see it, see that it looks like a separate place. If that stood alone, that would be the inference which I should draw from the fact of its being called by a separate name. I think it is quite unnecessary to draw such an inference here, because, taking the Ordnance survey, I look at it on that map and I see there is such a natural boundary round it that it may well have been called by a separate name. I look at the photograph, and I see that the *Dubh* loch is surrounded by high cliffs, which go all round it, whereas the *Fionn* loch is much less surrounded by cliffs, consequently there is a well-marked boundary round the *Dubh* loch. But then there is the element of width at the strait in question. Now the phait, as it is called, seems to be eighty yards broad; that is consistent with the strait which intervenes between *Loch Fionn* and *Loch Dubh* being a narrow piece of the loch, and not a separation of one loch from another. Then it is very shallow—that is certain from the evidence which has been called, and I think we must look at it according to its ordinary state. The loch, like most Highland lochs, is liable, according as there has been wet weather or not, to considerable differences of level. I will not trouble your Lordships by going through the evidence again. I will merely say that the conclusion in my mind is that in its ordinary state it is, or was before 1828, nearly knee deep. I think the man who makes it the shallowest of all says that it came to the small of the leg. I do not know what the size of the man was, but probably that might mean eight or nine inches. However, I think that would, according to the rest of the evidence, be exceptionally low. Most of the witnesses

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say that it was ordinarily about knee deep, which would be about a foot or thirteen inches deep, or something like that.

Shallowness is one of the elements to be considered when we are considering whether or no this narrow was itself a part of the same loch. It was first thrown out by Mr. *Mackintosh* in his argument, and I quite agree, that as a rule what you have to look at is the purpose of using the common rights on the surface, boating, fowling, fishing, and so on. Then, is this space between the sheets of water one which would prevent the use of those rights in common? If so, they are clearly not one loch. The shallowness has a great deal to do with it; but, looking at the evidence, I should have said myself that you could go from the one to the other with a boat in the ordinary state of things. It seems to have been done without much difficulty after the causeway was there; and Mr. *M'Intyre*, who was a midshipman, and therefore would have a trained eye to see whether the water was deep enough for boats, seems to have entertained no doubt that he passed it in a boat, and therefore a boat could go across it—not a keeled boat, he says, but a boat with a light draught of water. A flat-bottomed boat such as soldiers are landed in was suggested by the counsel. From his nautical experience he seems to have thought that such a boat, drawing eight or nine inches of water, could go across. That, my Lords, is strong evidence; and I should have found as a fact that it could have been crossed in a boat. I quite agree, however, that it is not conclusive at all.

It is a common thing to have a loch and then a bit of river joining it to another loch, sometimes shorter, and sometimes longer. In some districts I have known two lochs very close to each other, and when it comes to the uniting of the two, there is what is locally called a lead or a lane from the one to the other, and, according to its depth, you may force a boat through it or not. I cannot help thinking that, if there lie a river between the two, however short the river may be, that would be enough to make one say that they were separate lochs. Take the case of *Loch Katrine* at the *Trossachs*. There is a short reach of the *Teith* between *Loch Achray* and *Loch Katrine*. I do not remember enough to say whether it is too shallow, or whether it is too rapid, to let a boat through or not; still it is obvious that that would not be a part of *Loch Katrine*.

My Lords, that brings me to another important element, and that is to see whether the section of this division is so small that in the ordinary state of things there would be a perceptible current in the loch. There must be some motion of the water from the one to the other, but where the section of the loch is large that would not be perceptible. I cannot help thinking that if the division between the two was such that the level of the upper sheet was raised above that of the lower, so that there would be a perceptible flow from the one to the other, that would be a strong ground for saying that they were separate lochs. Upon that matter the evidence is difficult to reconcile, except by remembering that the loch rises and falls. When there has been much rain upon the upper part, upon *Loch Dubh*, I should expect that there would be a perceptible current there; but when there has not been much rain I should not expect to find a current. I should expect that the water would sometimes flow from *Loch Fionn* to *Loch Dubh*, that when the wind blows in that direction it would force the water to *Loch Dubh;* on the other hand, when the wind blows from *Loch Dubh*, it would send a current into *Loch Fionn;* that is what I should expect. I think the witnesses say upon the whole, that in the ordinary state of the loch that is what really does happen.

Now, my Lords, taking all these things together, putting it in an English way, if I were trying the case before a jury, and explaining the law to them, and giving them directions, I should say what I have said now, and I should say that if they came to the conclusion that these were separate lochs I could not blame them; on the other hand, if they came to the conclusion that they were one and the same loch, I could not blame them either. I should not disguise from them, nor do I disguise from your Lordships, that I think they are one and the same loch, that the connection between the two is sufficiently large and sufficiently deep to make them one and the same loch. The Lord Ordinary came to that conclusion, and two of the Judges of the Inner House came to a different conclusion. I think it may fairly be said that Lord *Gifford* intimates plainly that he would have come to the same conclusion as the Lord Ordinary, so that we may take it that they were pretty equally divided; consequently the decision does not come

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to us with any great prestige or weight. But whichever way the verdict was found, I should not have been able to say that I was dissatisfied with it. Now, unfortunately, your Lordships are here obliged to perform two tasks. You have to perform the tasks of jurymen as well as that of Judges. I can only say that if a jury had come into Court and said to me: We cannot agree; we perfectly understand what you have said, but still we cannot agree; there is a majority of us one way, and a minority, perhaps, of only one, the other; I should have said—indeed, I have constantly said—"Go and consider it again, and try to agree, if you can; and I would strongly advise the gentleman in the minority (I will not inquire on which side he is), that if there is a majority against him, he ought to consider his opinion as being open to very considerable doubt and hesitation." Now, my Lords, I must take my own words home to myself. If it rested with me alone, I should find upon the facts, as the Lord Ordinary has, and as the Court of Session has not. I find, however, that the two noble and learned Lords who have addressed your Lordships before me have come to a decided conclusion the other way; and I believe the noble and learned Lord who is to follow me, if not quite so decided in opinion, inclines the same way. Under these circumstances I can only take my own lesson home to myself. I should have found a verdict the other way, but I do not dissent from the decision which is arrived at by your Lordships.

LORD GORDON:—

My Lords, certainly it is with some hesitation that I have felt myself obliged to concur in the opinion of the majority of your Lordships with reference to the disposal of this case. There is undoubtedly a certain amount of responsibility which rests upon any one who forms an opinion upon a case of this kind where there has been such a difference of opinion in the Court below, but I addressed myself to the consideration of the case with some degree of interest, seeing the question involved a good deal of anxiety to the parties before us as litigants. I have come to the conclusion that really one must defer to the opinions of my two noble and learned friends who first expressed their opinion upon the facts of the case.

I feel, my Lords, that a considerable amount of onus rests upon the Appellant to establish his case; and I think that, when we come to consider the evidence, we find that he has not established it—that he has not shewn that he has such exclusive possession as would justify him in asserting the right which he attempts to assert in the conclusions of the summons.

I find that Lord *Gifford*, who may be held to be in a divided position so far as regards the substance of the opinion which he expressed, deals with the matter with reference to the obstruction which was caused by the artificial erection in the loch. He says: "The circumstances are exceedingly singular, and there is such a marked distinction between these two lochs in natural feature that I do not dissent from the judgment which your Lordship proposes, and I think that on this part of the case the artificial barrier is really a very material element, for it has subsisted without objection for more than forty years. The altered state of matters has become the natural state so to speak, and the two lochs are now so completely separated that I do not dissent from the judgment to which your Lordships have come, and which gives the *Dubh* loch exclusively to the proprietor whose lands wholly surround it" (1). Now there is no doubt that there was a natural barrier, to some extent, before the artificial barrier was constructed. I think the artificial barrier cannot be thrown out of view in the case; and one is glad to get some firm footing in a case of this kind where the elements are so few. I think the artificial barrier did constitute an obstruction to the passage of boats, and that there has not been such an exclusive possession by boats after the artificial barrier was constructed as would interfere with the presumption against the passage of boats both before and since that barrier was erected.

I feel therefore, my Lords, that I am very much in the position of the juryman who would very properly be lectured by my noble and learned friend, Lord *Blackburn*, if he was addressing a jury, and that I ought in this case to defer to the opinion of the majority of your Lordships. I would only say that after the very clear and exhaustive opinion which has been given by my noble and learned

(1) Scotch Cases, 4th Series, vol. v. at p. 288.

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friend, Lord *Selborne* (1), which I cannot attempt to improve upon in any way, I think the best course I can follow is to say that I adopt the conclusion which my noble and learned friend now on the woolsack has proposed that the House shall adopt; and further, that I adopt the opinion which Lord *Selborne* has so clearly expressed.

With reference to the question of law, I think my noble and learned friend opposite (Lord *Blackburn*) has very fully gone into that, and I do not think I can add anything to the very clear exposition of the law as derived from previous decisions which he has given.

Interlocutor complained of affirmed, and appeal dismissed with costs.

Lords' Journals, 27th June, 1878.

Agents for Appellant: *Tippetts & Co.*
Agents for Respondent: *J. & J. Graham.*

(1) See *ante*, at p. 1336.

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BANKER—*Branch Banks—Effect of uncommunicated Transfers and Entries of Payment—Notice of Dishonour of Promissory Note.*] The mere fact of cancelling the signature of the makers of a dishonoured promissory note and writing "paid" on the note, corrected before the note is sent back to the Plaintiffs by a memorandum thereon "cancelled in error," cannot be effectual to charge a bank with the receipt of the money.—*Warwick* v. *Rogers* (5 M. & G. 340) approved.—Where a promissory note is returned dishonoured to the Plaintiffs, the amount thereof having been transmitted by transfer drafts and entries in the bank's books, from the branch where the same was made payable to the branch where the Plaintiffs paid the same in, such transfer and entries not being communicated to the Plaintiffs, *held*, that the bank could not be charged with the receipt of the money.—The position of branch banks is, that in principle and in fact they are agencies of one principal banking corporation or firm, notwithstanding that they may be regarded as distinct for special purposes, *e.g.*, that of estimating the time at which notice of dishonour should be given; or of entitling a banker to refuse payment of a customer's cheque except at that branch where he keeps his account. PRINCE *v.* ORIENTAL BANK CORPORATION - - - P. C. 325

BANKRUPTCY—*Act of Bankruptcy—Stock Exchange Rules—Bankruptcy Act*, 1869.] The rules of the *Stock Exchange* as to defaulting members of the body are the rules of a domestic forum, which have no influence on the rights of those who are not amenable, as members, to the jurisdiction of that body. They cannot, therefore, govern the rights of the general creditors of a defaulting member.—*C.* was a member of the *Stock Exchange;* he became unable to meet his *Stock Exchange* engagements, and he gave notice thereof to the secretary. In such a circumstance the rules of the *Stock Exchange* prescribe the course to be followed. The defaulter ceases to be a member of the body. Two members of the body act as official assignees of the defaulter, a meeting of the creditors is called, the defaulter (as he is required to do) makes his statement, and the assembled creditors having decided what is to be done, these official assignees carry the decision into execution. The committee of the *Stock Exchange* has the power to re-admit the defaulter or to refuse him re-admission. *C.* made his statement at the first meeting, declaring, at that time, that he had no debts outside the *Stock Exchange.* His *Stock Exchange* creditors then consented to accept a composition; and, to provide for a part of it, he, at the demand of the official assignee, gave them a cheque for £5000 then standing to his credit in the *Bank of England.* The official assignees obtained the money

BANKRUPTCY—*continued.*
and apportioned it among his *Stock Exchange* creditors. He afterwards confessed to owing debts to a large amount to outside creditors, and was declared a bankrupt. The trustee in bankruptcy, on behalf of the general creditors, claimed from the official assignees of the *Stock Exchange* the £5000:—*Held*, that he was entitled to claim it; for that what was done by *C.* amounted to a *cessio bonorum*, and constituted an act of bankruptcy.—*Per* Lord *Blackburn:* The money was voluntarily paid with the view to give the *Stock Exchange* creditors an undue preference.—*Per* Lord *Blackburn:* In the 167th Rule of the *Stock Exchange*, that the assignees shall collect and pay "the assets" to their joint account at a banker's, the word "assets" means the whole of the defaulter's available property; and under the 153rd rule these assets are to be distributed exclusively to those creditors whose claims arise out of *Stock Exchange* transactions.—*Quære*, whether, when it is intended to transfer to particular creditors the whole of a debtor's property, the transfer of a part in pursuance and performance of that intent, would not be an act of bankruptcy.—The terms of the 92nd section of the *Bankruptcy Act*, 1869, explained. Tomkins *v.* Saffery - H. L. (E.) 213

2. —— *Composition with Creditors*—32 & 33 *Vict. c.* 71—*Contingent Claims.*] A bankruptcy and a composition arrangement under the 126th section of the *Bankruptcy Act*, 1869, differ materially from each other.—By the 126th section of the *Bankruptcy Act*, 1869 (32 & 33 Vict. c. 71), a debtor seeking to obtain a composition with his creditors is bound to make a statement of his debts with the names and addresses of his creditors. By sect. 31 of the Act contingent claims are proveable in bankruptcy, and the 126th section renders them proveable in a composition arrangement. A debtor filed a petition to obtain such an arrangement, and inserted in his statement the name and address of a creditor, describing a certain sum of money as due to him; the creditor claimed a larger sum, obtained the allowance of it, signed a composition deed (the composition being payable in one month from the registration of the deed), and received the composition agreed to by the creditors. While this arrangement was being made, a suit in the Court of Admiralty was proceeding against the debtor, in which suit the creditor had given a bond, as surety for the debtor, for the payment of any costs and damages found due in that suit. The liability on this bond was in no way referred to in the debtor's statutory statement. After the composition had been completed, and the composition had been paid, the Admiralty suit was decided against the debtor, and, on default by the debtor, the creditor was called on to pay the amount secured by the bond:—*Held* (*dub.* Lord *Gordon*), that, under these circumstances, an action for money paid under the Admiralty bond was maintainable against the debtor, no mention of the bond having been made in the statutory statement, and such payment therefore, not being affected by the provisions of the 31st and the 126th sections of the *Bankruptcy Act*.—The conditions imposed by the 126th section of the *Bankruptcy Act*, 1869, are conditions for the benefit of the creditors. The creditor may waive them—the debtor cannot.—*Per* Lord *Blackburn:* A resolution to accept a composition and the acceptance of it have not the same effect as a discharge in a regular bankruptcy.—If an estimate of a contingent debt can be made so as to be inserted in the statement, the statute throws the burden of making it on the debtor. If its amount could not be estimated in any way, the resolution of the creditors agreeing to a composition on other debts could not affect it.—*Ex parte Carew* (Law Rep. 10 Ch. Ap. 308) approved.—The observations made in *Campbell* v. *Im Thurn* (1 C. P. D. 267) commented on. Breslauer *v.* Brown [H. L. (E.) 672

3. —— *Proof by or against Joint or Separate Estate—Partnership—Fraud.*] Where there is a bankruptcy of a firm, and there is also a bankruptcy of an individual member of that firm, the joint estate of the firm and the separate estate of the individual member are, as a rule, kept distinct from each other.—But where, under the existing law of bankruptcy, the joint creditors are admitted to prove against the separate estate, it is not material whether the separate estate has or has not been, as a matter of fact, benefited at the cost of the joint estate.—When an individual partner, fraudulently as to his partners, withdraws funds from the partnership and applies them to his own use, the creditors of the firm are entitled to proof against the separate estate of the individual partner.—*Per* Lord *Blackburn:* The length of time during which the fraud was carried on, could not affect the rights of the creditors of the firm, whatever effect it might have if the question arose solely between the separate partner and the members of the firm itself. Read *v.* Bailey [H. L. (E.) 94

BILL OF EXCHANGE—*Drawn and accepted by the same Parties—Custom—Re-exchange*] Although bills of exchange, drawn and accepted by the same parties, may be in strictness promissory notes rather than bills, yet where the intention to give and receive such documents as instruments capable of being negotiated in the market as bills of exchange is clear, both the holders and the parties may treat them accordingly.—A custom as to allowing a fixed percentage by way of liquidated damages in lieu of exchange, re-exchange, and other charges, when the bills are returned from the colonies dishonoured, however valid in law, does not apply in the absence of an agreement, express or implied, to allow re-exchange.—Where the holders of bills drawn by *P. L. & Co.* in *London* on *P. L. & Co.* in *Australia*, having no occasion to transfer money from *London* to *Australia*, sent them to the latter country, not for the purpose of employing the proceeds there, but of having them remitted to *London*, the dishonour of such bills does not entitle the holders to recover damages by way of re-exchange.—The right to "re-exchange," in the absence of express agreement, arises when the holder of a bill who has contracted for the transfer of funds from one country to another has sustained damages by its dishonour through having to obtain funds in the country where the bill was payable. "Re-exchange" is the measure of those damages. Willans *v.* Ayers - - - P. C. 133

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BUILDING CONTRACT—*Extra Work—Written Order—Acquiescence.*] A contract for the construction of large iron buildings for a lump sum, contained a clause, *inter alia*, that no alterations or additions should be made without a written order from the employers' engineer, and no allegation by the contractors of knowledge of, or acquiescence in, such alterations or additions on the part of the employers, their engineers or inspectors, should be accepted or available as equivalent to the certificate of the engineer, or as in any way superseding the necessity of such certificate as the sole warrant for such alterations and additions. During the execution of the contract the contractors alleged it was impossible to cast certain iron trough-girders of a specific weight, and subsequently they were allowed to erect girders of a much heavier weight; and the actual weights were entered in the engineer's certificates issued from time to time authorizing interim payments. On the completion of the work the contractor claimed a considerable amount in excess of the contract price for the extra weight of metal supplied:—*Held*, reversing the interlocutor of the Court below, that the engineer's certificates were not written orders, and the claim was therefore excluded by the terms of the contract. Tharsis Sulphur and Copper Company *v.* M'Elroy & Sons - - H. L. (Sc.) 1040

CANADA, LAW OF—*Canadian Civil Code—Appropriation of Payments—Rescission of Appropriation.*] The giving of a cheque by the debtor with the intention of appropriating it to the debt of the Plaintiffs, and the giving of a receipt therefor by the Plaintiffs' agent, acting within the scope of his authority, constitute by the law of *Canada* an appropriation as intended. Such appropriation could only be changed by a rescission of the appropriation made by consent of all parties interested.—In an action against the agent for moneys had and received on account of the Plaintiffs, such rescission, being put on the footing of a contract by the Canadian law, must be specially pleaded as a defence. Kershaw *v.* Kirkpatrick P. C. 345

2. ——*Expropriation—Report of Commissioners not final—Action to augment Indemnity*—27 & 28 *Vict. c.* 60—35 *Vict. c.* 32, *s.* 7.] Although a report of Commissioners appointed under Colonial Act, 27 & 28 Vict. c. 60, to fix the compensation payable for expropriated lands, is no longer final, having regard to 35 Vict. c. 32, s. 7, it must, nevertheless be considered correct until it is proved to be erroneous.—In an action under that section to augment the amount of indemnity for expropriated lands, *held*, that the *onus* lay on the Plaintiffs to prove that the report was erroneous in itself and not merely with reference to the evidence adduced before the Commissioners.—*Bagg* v. *Mayor of Montreal* (19 Low. Can. Jur. 136) approved. Morrison *v.* Mayor, &c., of Montreal - - - - P. C. 148

3. —— *Expropriation—Apportionment of Indemnity*—27 & 28 *Vict. c.* 60—29 & 30 *Vict. c.* 56, s. 12.] The Commissioners of Expropriation appointed under Act 27 & 28 Vict. c. 60, must under Act 29 & 30 Vict. c. 56, s. 12, at the same time that they determine the amount of indemnity for expropriated land, assess and apportion that indemnity upon the different persons benefited by the improvements. Such assessment and apportionment cannot be made after the report of the Commissioners has been homologated, and they have become *functi officio*. Mayor, &c., of Montreal *v.* Stephens - - - P. C. 605

4. —— *Feudal Tenures in Lower Canada—Feudal Rights of the Seignior extinguished in Lands acquired by the Crown—Indemnity payable to the Seignior.*] By the law of feudal tenure in *France* subsequently introduced into French *Canada*, and thereafter continued by virtue of the *Quebec Act* as the law of *Lower Canada*, the acquisition by the Crown of lands held from or under a seignior as part of his fief extinguishes all feudal rights in those lands and gives to the seignior a mere right of indemnity.—By the law as it existed up to the time of the Ordinance of *Louis* XIV. in 1667, in reference to which law the parties in this case contracted, the amount of that indemnity, when not determinable by legal custom or written law, was in the case of land held by *roturiers* one-fifth of the price. Les Sœurs Dames Hospitalières de St. Joseph de l'Hôtel-Dieu de Montréal *v.* Middlemiss - - - - P. C. 1102

5. —— *Petition for Leave to appeal—Canadian Act*, 38 *Vict. c.* 11, *s.* 47—*Prerogative.*] Although Her Majesty's prerogative to allow an appeal is preserved by Canadian Act, 38 Vict. c. 11, s. 47, their Lordships declined to advise its exercise in a case where the amount at issue was only $300, and where the issue between the parties related simply to the legal construction and effect of a particular contract, and where no general principle was involved, and no other cases were necessarily affected by the decision complained of. Johnston *v.* Ministers and Trustees of St. Andrew's Church, Montreal - - - P. C. 159

6. —— *Powers of Provincial Legislature—British North America Act*, 1867, *s.* 92, *sub-ss.* 2-9—*Quebec Act*, 39 *Vict. c.* 7—*Licenses—Stamps—Direct Taxation.*] The clauses of Act 39 Vict. c. 7 (passed by the Legislature of *Quebec*), which impose a tax upon certain policies of assurance and certain receipts or renewals, are not authorized by the *British North America Act*, 1867, s. 92, sub-ss. 2, 9.—A license Act by which a licensee is compelled neither to take out nor to pay for a license, but which merely provides that the price of a license shall consist of an adhesive stamp, to be paid in respect of each transaction, not by the licensee but by the person who deals with him, is virtually a Stamp Act and not a License Act.—The imposition of a stamp duty on policies, renewals, and receipts, with provisions for avoiding the policy, renewal, or receipt in a Court of Law, if the stamp is not affixed, is not warranted by the terms of an Act which authorizes the imposition of direct taxation. Attorney-General for Quebec *v.* Queen Insurance Company [P. C. 1090

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COMPANY—*Promoters*—*Fiduciary Position*—*Concealment of Material Facts.*] Persons who purchase property and then create a company to purchase from them the property they possess, stand in a fiduciary position towards that company, and must faithfully state to the company the facts which apply to the property, and would influence the company in deciding on the reasonableness of acquiring it.—A "syndicate" (or partnership) of persons, of which one *E.* was at the head, purchased from the official liquidator of an insolvent company an island said to contain valuable mines of phosphates. *E.*, who managed the business of this purchase, prepared to get up a company to take over the island and to work the mines. He named five persons as directors. Two were abroad. Of the three others, two of the proposed directors were persons entirely under his control, and were furnished by him with the shares which were set forth in the memorandum of association as necessary to qualify for the office of director. One of these two persons appeared to have acted as a business agent for *E.*; the other was a private friend of *E.* The sale of the island was made, nominally, by a person who had really no interest in the island, and was made to the director who was the business agent of *E.*, and who appeared as the purchaser for the company. The two directors, with whom, through *E.'s* arrangement, a third person, *D.* (one entirely uninformed on the subject of the original purchase, and the subsequent sale), was associated, assuming to act as directors of the company, accepted, on its behalf, the purchase. A prospectus was issued, giving a very favourable account of the scheme. Many persons took shares. At the first meeting of shareholders, *D.* took the chair as a director. Being questioned by a shareholder as to certain rumours relating to the purchase of the island and its price, on the first sale, and then on its resale to the company, *D.* avowed his want of knowledge, but declared his belief in the goodness of the scheme. The real circumstances of the sale and purchase were not disclosed to the shareholders, but the purchase of the island was adopted by the shareholders then present. This was in February, 1872. In June, 1872, there was a general meeting of the shareholders. The rumours before referred to had become stronger, and a committee of investigation was appointed; on the receipt of whose report in August, 1872, the original directors were, at a public meeting, removed, and a new set of directors appointed, with power to take measures, &c., for the benefit of the company. The new directors entered into a correspondence with the vendors of the island, which terminated in nothing, and a bill was, in December, 1872, filed to rescind the contract:—*Held*, that the contract could not be sustained, but—*Dub.* Lord *Cairns*, L.C., whether there had not been, on the part of the company, such delay in coming for relief as to constitute laches that deprived the company of the title to obtain it.—Observations on the duty of promoters of a company. Erlanger *v.* New Sombrero Phosphate Company - - H. L. (E.) 1218

2. —— *Shares "fully paid up"*—*Certificates and Statutory Returns*—*Estoppel*—*Holding in Trust*—*Companies Act*, 1867.] A company (not registered under the *Companies Act*, 1867) issued shares as "fully paid-up," and also certificates of those shares describing them as fully paid-up, and made the annual returns giving them the same description. The company entered into a contract with *G.* to purchase from him a mill and machinery in *Nottingham*, part payment for which was to be made to *G.* in "fully paid-up shares." They

COMPANY—*continued.*

were not, in fact, paid-up, and there was no contract with respect to them such as is required by the *Companies Act* of 1867, s. 25. *G.* (who was really the vendor of this mill and machinery, and promoter and managing director of the company) received the shares. He was himself at the same time making a contract with *B.* for the purchase of other landed property in another county—*Cornwall*, and *B.* agreed to accept a part of the purchase-money in fully paid-up shares of the company. *B.* had just before bought this *Cornwall* property from *N.*, and *B.'s* purchase-money for it was paid to *N.* through *B.'s* solicitor, who also acted, in the conveyance, for *N.* The conveyance was made, not by *N.* to *B.* and then by *B.* to *G.*, but (at *B.'s* desire) was made direct from *N.* to *G.*, and 200 of the shares held by *G.* were handed over to *N.*, who swore that he only received them as trustee for *B.* *N.'s* name was entered on the register of the company as the holder of the shares, and he once sent a proxy to *G.* to vote at a general meeting, describing himself therein as a shareholder in the company. The certificates of the shares were given to *B.* himself. The company was ordered to be wound up:—*Held*, that under these circumstances *N.* was not liable to be placed on the list of contributories in respect of the 200 shares.—*Per* Lord *Cairns*, L.C.: In a matter of this kind the official liquidator is not entitled, when putting in force the 25th section of the Act of 1867, to disregard the actual transactions that have taken place between the parties.—If shares are taken in the course of business for valuable consideration, on the person who asserts that he who took the shares had notice that they were not actually paid up lies the burden of proof of that notice.—The 25th section of the *Companies Act*, 1867, applies to a company generally, and not to its liquidation alone.—Remarks on the unsatisfactory manner in which cases arising upon claims by liquidators are brought before the Courts. Burkinshaw *v.* Nicolls - H. L. (E.) 1004

COMPENSATION—Lands in *Canada*—Expropriation - - - - 148
See Canada, Law of. 2.

—— Under Railways Clauses Act - - 165
See Railway. 1.

COMPOSITION WITH CREDITORS - 672
See Bankruptcy. 2.

CONDITION—Precedent—Bill of lading—Seaworthiness - - - - 72
See Ship.

CONTINGENT CLAIMS—Composition - 672
See Bankruptcy. 2.

CONTRACT—Fraudulent—Whether void or voidable - - - - - 831
See Victoria, Law of. 1.

—— Sale of land—Statute of Frauds - 1124
See Vendor and Purchaser.

—— Ship-building—Construction—Scotch Law
See Scotch Law. 3. [552

CONVERSION—Will - - - - 404
See Will.

COPYRIGHT—*Dramatic—Materiality of Imitation.*] There cannot be a violation of the 3 & 4 Will. 4, c. 15, s. 2, where the matter or thing taken from the first work and introduced into the second is not material and substantial.—*A.* had produced a drama on the tale as written, and the play as acted, of "*The Wandering Jew*," the authorship of M. *Eugène Sue*, but had introduced two scenic representations into his production, not to be found in the French original; and *B.* afterwards produced a drama on the same subject, in which these two scenic representations were also introduced; an arbitrator had found "that two scenes or points had been taken direct from the drama of the Plaintiff's, but that the drama of the Defendant is not, except in these respects, a copy from or a colourable imitation of the drama of the Plaintiffs," and had directed the verdict to be entered for the Defendant:—*Held*, that the finding was conclusive.—The words in the statute "production or any part thereof" must receive a reasonable construction, and are to be treated as implying some part that is substantial and material. Chatterton *v.* Cave - - H. L. (E.) 483

CORPORATION—For special purpose—Negligent performance of duties - - 430
See Statutory Obligation. 1.

COSTS—Slander - - - - 944
See Practice. 1.

CROWN—Right of—Fishery—Inland lake 641
See Lake. 1.

CROWN LANDS—*Queensland* - 115, 614, 627
See Queensland, Law of. 1, 2, 3.

DAMAGES—Dishonour of bill of exchange—Re-exchange - - - 133
See Bill of Exchange.

DISCHARGE—Bankruptcy and composition—Difference between - - 672
See Bankruptcy. 2.

DISCLAIMER—Patent - - - 34
See Patent. 1.

DISHONOUR—Promissory note—Notice - 325
See Banker.

DOMICIL—*Domicil of Choice—Animus manendi.*] *M.* having abandoned his domicil of origin, which was in *Scotland*, acquired a new domicil in that portion of *New South Wales* which in 1859 was by proclamation separated therefrom and became the colony of *Queensland*. Thereafter he built in *New South Wales* a house suitable to his fortune, his wife and children residing there till his death, removing thereto from *Queensland*, he himself also residing there except at times when he was engaged upon his business or political duties in *Queensland*. He died, however, and was buried at his own wish in *Queensland*:—*Held*, on a special case stating as above, that whether or not at the moment of separation in 1859 the domicil of *M.* was transferred to and became a domicil in *Queensland*, or continued to be a domicil in *New South Wales*, from the time the house built therein was finished, and the establishment of *M.* removed thereto, his *animus manendi* in *New South Wales* must be inferred, and his domicil there determined.—It is always material, in determining what is a man's domicil, to consider where his wife and children

DOMICIL—*continued.*
live and have their permanent place of residence, and where his establishment is kept up. PLATT *v.* ATTORNEY-GENERAL OF NEW SOUTH WALES [P. C. 336

DRAMATIC COPYRIGHT - - - - 483
See COPYRIGHT.

ENDOWED SCHOOLS ACT, 1869, *ss.* 5, 11, 19, 23, 24—*Educational Endowment—Vested Interests.*] A direction in a deed of foundation that certain persons may be or continue at the school thereby founded after the age of manhood, does not make the endowment or any part of it less an "educational endowment" within the meaning of the *Endowed Schools Act*, 1869, ss. 5 and 24, than it would have been if no such privilege had been granted to those persons; the whole endowment being applicable "for the purposes of the education at school of boys or girls," and no part of it being applicable or applied to any "other charitable use."—Sect. 19 of the said Act prevents the Commissioners from making particular religious opinions more or less necessary than they were before to qualify generally for the office of governor under the scheme. It does not prohibit them from making the office of the rector of a parish a qualification for a place on the governing body of a Church of *England* school.—It is not *ultrà vires* the Charity Commissioners under sect. 23 of the Act of 1869 to provide in a scheme a species of visitatorial jurisdiction sufficient to indemnify the governors and to bind the objects of the Charity in reference to proceedings "under the scheme."—Scheme remitted to the Charity Commissioners, inasmuch as sufficient provision had not been made therein to satisfy existing educational interests according to the requirements of sect. 11 of the Act of 1869. *In re* HODGSON'S SCHOOL - - - - - P. C. 857

2. —— *ss.* 13, 39—"*Vested Interests.*"] A petition having been presented against a scheme of the Charity Commissioners relating to certain endowed schools by some inhabitants and ratepayers, on the ground that they and the class represented by them had a right by the founder's deed to have their children taught free of expense in the school, and that this right would be taken away or subjected to change by the scheme:—*Held*, that the appeal could not be entertained. No individual petitioner complained that he had a child at the school whose *status* would be interfered with; and the general interest of the class under the founder's will did not come within the category of "vested interests" saved, or required to be saved, by the *Endowed Schools Act*, 1869. *In re* SHAFTOE'S CHARITY - - P. C. 872

EDUCATIONAL ENDOWMENT — Endowed Schools Act - - 857, 872
See ENDOWED SCHOOLS ACT. 1, 2.

ENGINEER—Certificate of - - - 1040
See BUILDING CONTRACT.

ENTAIL—Scotch law - - - 297
See SCOTCH LAW. 4.

—— Succession duty - - - 505
See SUCCESSION DUTY.

ESTOPPEL—Certificates of shares - - 1004
See COMPANY. 2.

EVIDENCE—Negligence—Railway company
See NEGLIGENCE. 2. [1155

EXPROPRIATION—Lands in *Canada* 148, 605
See CANADA, LAWS OF. 2, 3.

FALSE DECLARATION—Application for Crown lands, *Queensland* - - 627
See QUEENSLAND, LAW OF. 2.

FALSE PRETENCE—Sale of goods—Passing of property - - - - 459
See SALE OF GOODS. 1.

FARE—Tramway Acts - - - 58
See SCOTCH LAW. 13.

FEU CONTRACT—Poor-rate—Scotch law 1298
See SCOTCH LAW. 7.

FEUDAL TENURE—*Lower Canada* - 1102
See CANADA, LAW OF. 4.

FIDUCIARY RELATION—Promoters of company
See COMPANY. 1. [1218

—— Purchase by agent - - - 254
See SCOTCH LAW. 11.

FISHERY—Inland lake—Right of Crown 641
See LAKE. 1.

—— Salmon—Scotch law - - - 1, 736
See SCOTCH LAW. 7, 8.

FLOWING WATER — Overflow — Local Act — Negligence - - - - 430
See STATUTORY OBLIGATION. 1.

FOREIGN SHIP — Arrest at sea — Re-arrest — Jurisdiction - - - 1316, 1322
See JURISDICTION. 1, 2.

FORFEITURE—Lease of mine - - 165
See RAILWAY. 1.

—— Crown lands, *Queensland* - 115, 614
See QUEENSLAND, LAW OF, 1, 3.

FRAUD—Agent—Liability of principal - 106
See PRINCIPAL AND AGENT. 1.

—— Contract—Obtained by - - 831
See VICTORIA, LAW OF. 1.

—— Partner overdrawing account — Proof in bankruptcy - - - - 94
See BANKRUPTCY. 3.

—— Sale of goods—False pretence - 459
See SALE OF GOODS. 1.

—— Trade mark - - - - 355
See TRADE MARK.

FRAUDS, STATUTE OF—Contract for sale of land
See VENDOR AND PURCHASER. [1124

FRAUDULENT PREFERENCE - - 213
See BANKRUPTCY. 1.

GRIQUALAND, LAW OF—*Construction of a Grant in Erfpacht, subject to Conditions—Full Ownership — Beneficial Ownership of Minerals in Land granted in perpetual Quit-rent.*] In an action against the Government for an account and payment of moneys in respect of licences to diggers for diamonds upon an estate of the Plaintiff, it appeared that the original grant of the estate in question was made by the *Orange State* on perpetual quit-rent (*voordurende erfpacht*), but subject to conditions imposed or to be imposed by the State; the *Orange State* Ordinance, No. 3, 1871

GRIQUALAND, LAW OF—*continued.*
having thereafter imposed conditions, which were subsequently recognised by the Crown, under which the Plaintiff and the Government took each one-half of the licence moneys for defraying the expenses of superintending the digging:—*Held*, that it was too late for the Crown without any evidence that its officers acted from mistake to impeach the Plaintiff's title to the minerals upon a presumption derived only from the form of the grant, to the effect that it created an *emphyteutic* tenure only.—By Roman-Dutch law a grant on perpetual quit-rent (*voordurende erfpacht*) is understood to be a grant in *emphyteusis*, and under it the grantee has the usufruct only, and not the right to minerals; but that law was declared to be the common law of the *Orange State* only "where no other law has been made by the Volksraad." Under the special terms of the grant itself, and having regard to Ordinance No. 3 of 1871 (which was a legislative declaration by the Volksraad of its effect), and to proclamations issued on behalf of Her Majesty, this grant, notwithstanding its form, had not and was not intended to have the limited operation of a grant in *emphyteusis*, but gave the full ownership of the land to the grantee. Webb *v.* Giddy. Giddy *v.* Webb [P. C. 908

HEIR-AT-LAW—Parties—Suit for construction of will - - - - 404
See Will.

HERITORS—New parish—Seats in church 14
See Scotch Law. 2.

HOSPITAL—Exemption from land tax - 473
See Land Tax.

IMITATION—Copyright - - - 483
See Copyright.

IMPROBATIVE DEED - - - 582
See Scotch Law. 6.

INDEMNITY—Commission agent - - 880
See Principal and Agent. 2.

INDIAN HIGH COURTS—Power of - 889
See Indian Law.

INDIAN LAW—*Powers of Legislature—Indian Councils' Act*, 1861, *s.* 22—*Indian High Courts Act*, 1861—*Conditional Legislation—Act XXII. of* 1869.] Act No. XXII. of 1869 of the Indian Legislature, which excludes the jurisdiction of the High Court within certain specified districts, is not inconsistent with the *Indian High Courts Act* (24 & 25 Vict. c. 104), or with the charter of the High Court, and is in its general scope within the legislative power of the Governor-General in Council.—The 9th section of that Act, which confers upon the Lieutenant-Governor of *Bengal* the power to determine whether the Act, or any part of it, shall be applied in a certain district, is conditional legislation, and not a delegation of legislative power.—Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a provincial legislature, they may be well exercised, either absolutely or conditionally; in the latter case leaving to the discretion of some external authority the time and

INDIAN LAW—*continued.*
manner of carrying its legislation into effect, as also the area over which it is to extend. The Queen *v.* Burah - - - P. C. 889

INEQUALITY OF CHARGE—Railway traffic
See Railway. 2. [1029

INFRINGEMENT—Patent - - - 34
See Patent. 1.

INJUNCTION—Waste—Negative covenant 709
See Waste.

INLAND LAKE - - - 641, 1324
See Lake. 1, 2.

INSOLVENCY—Assignee—*South Australia* 842
See South Australia, Law of.

INSURANCE—*Marine—Collision of two Ships—One lost—Both belonging to the same Owner—Claims of Underwriters and Others*—17 & 18 *Vict. c.* 104, *and* 25 & 26 *Vict. c.* 63.] There is no independent right in underwriters to maintain in their own name, and without reference to the person insured, an action for damage to the thing insured.—Although the underwriters have paid for a total loss, and are entitled to all the rights in the injured ship which belong to its owner, yet if that owner cannot assert a right for damages against the wrongdoer, neither can the underwriters.—Two ships, the property of the same owner, collided; the underwriters paid the insurance effected on the lost ship, and then claimed to rank *pari passu*, with the owners of cargo destroyed, in the distribution of the fund lodged in Court by the owner as proprietor of the ship which did the damage:—*Held* (reversing the decision of the Court below), that the underwriters had no such right under the circumstances of the case.—*Per* Lord *Cairns*, L.C.: The underwriters' right must be asserted in the name of the person insured, but if he be the person who has caused the damage, the right cannot be maintained against himself.—*Per* Lord *Penzance*: The underwriters of the lost ship have no right of action against the owner of the ship that did the mischief, as he himself had no such right, inasmuch as, being the owner of both vessels, any right of action he had must be a right of action against himself, which is an absurdity, and a thing unknown to the law. Simpson *v.* Thompson - - H. L. (E.) 279

JOINT AND SEPARATE ESTATE—Proof in bankruptcy - - - - 94
See Bankruptcy. 3.

JUDGE—Explanation by—Motion for new trial
See Practice. 2. [483

JURISDICTION—*Foreign Ship—Arrestment at Sea—Practice.*] The diligence of arrestment is inapplicable to a ship sailing on her voyage; and force must not be used to bring the vessel back to port.—An arrestment *ad fundandam jurisdictionem* was used on a vessel lying in *Glasgow Harbour*. A second warrant of arrestment on dependence of the action was then given to the messenger-at-arms to execute; but he finding that the vessel had sailed on her voyage, pursued her on board a steam-tug with thirty men, and overtaking her some way down the *Clyde*, within the jurisdiction of the Scotch Courts, as she was approaching the high seas, seized her, and brought

JURISDICTION—*continued.*

her back to port, and dismantled her:—*Held*, affirming the decision of the Court below, that the execution of the arrestment was illegal, and therefore should be recalled. Borjesson *v.* Carlberg (First Appeal) - **H. L. (Sc.) 1316**

2. —— *Foreign Ship — Re-arrestments held invalid.*] A ship on her voyage having been arrested by a warrant on dependence of an action, and brought back by force into harbour, the arrestment was recalled as illegally executed. Other arrestments were then used against the vessel by parties acting in concert with the original arresters:—*Held*, affirming the decision of the Court below, that the second arrestments must also be recalled. Borjesson *v.* Carlberg (Second Appeal) - - **H. L. (Sc.) 1322**

LAKE—*Inland non-tidal Lake—Several Fishery—Public Right of Fishing—Evidence—Question for Jury.*] The Crown has no *de jure* right to the soil or fisheries of an inland non-tidal lake.—If there are acts *in pais*, which would be admissible as evidence of the title of the Crown, they must be submitted to a jury. They cannot be taken by the Judge and made the basis of a decision by himself alone.—A general grant by the Crown of a several fishery in a non-tidal lake is not, without more, sufficient to establish the title thereto; and, where there is no evidence of acts of possession by the grantee at the particular part of the lake which is the place in dispute, can have no effect.—A claim was made for a several fishery extending over the whole of *Lough Neagh*, a large non-tidal lake in *Ireland*, including therein a place called *F.*, where the Defendants were charged with having unlawfully trespassed on the Plaintiffs' several fishery. The claim was founded on a grant by *Charles* II., dated in 1660, and upon certain leases since made by persons claiming title under that grant, and payments of rent under grant and leases were shewn. No evidence was given of the title of the Crown to the soil or fishings of the lake, the limits of the fishery, as described in the grant, did not appear to include the whole of the lake, and, as to the place, *F.*, which was the subject of dispute, there was no mention of it in the grant, nor was there evidence that the grantee, or those who claimed under him, had enjoyed exclusive possession of the place. Evidence of convictions for trespassing on the lake was given, but that evidence did not apply to *F.* The Defendants set up a claim of right on the part of the public to fish at *F.*, and produced evidence of user in support of their claim. The Judge at the trial did not leave the case as a question of fact for the jury, but took upon himself, upon the Plaintiffs' evidence, to direct the jury to find a verdict for the Plaintiffs:—*Held*, that the case was, (with proper directions from the Judge on points of law,) one of fact for the decision of the jury, and the order of the Court below, which had directed a new trial, was affirmed.—Observations as to the evidence, given on the one side and on the other, in this case.—*Per* Lord *Blackburn*: Recitals in documents are no evidence of what is there recited, though actual possession, in conformity therewith, would constitute a *primâ facie* title.—*Per* Lord *Blackburn*: There is no authority to shew that the Crown is of common right entitled to land covered by water, where the water is not running water forming a river, but still water forming a lake. The *dictum* on this point of Mr. Justice *Wightman* in *Marshall* v. *The Ulleswater Steam Navigation Company* (3 B. & S. at p. 742) not approved.—Bristow *v.* Cormican - - **H. L. (I.) 641**

LAKE—*continued.*

2. —— *Rights of Riparian Proprietors — Separate Lakes connected by Narrow and Shallow Channel.*] Action for declarator of common right in the fishing, fowling, and boating in, over, and on *Loch F.*, an inland loch or lake. The Pursuer was a riparian owner on *Loch F.*, which was separated from *Loch D.* by a narrow and shallow channel (which was not a river), and more materially divided by a causeway of loose stones erected more than forty years ago. He claimed that *Loch F.* and *Loch D.* were one. The Defender owned all the land lying round *Loch D.* Both proprietors held their lands *cum lacubus* merely:—*Held*, affirming the decision of the Court below, Lord *Blackburn* doubting, that *Loch D.* was a separate and distinct loch, and that therefore the Pursuer had no right therein. The grounds of decision being the difference of name, the configuration of the ground, and the existence of the causeway. Mackenzie *v.* Bankes [**H. L. (Sc.) 1324**

LAND TAX — *Exemption — Hospital.*] Taxing Acts must be construed strictly; Where therefore land which in the 4 Wm. & M., being employed for charitable purposes, as the site of an almshouse or hospital, was, on that account, declared by a statute then passed (c. 1) to be exempt from the land tax at that time imposed—and the like words of exemption were used in a subsequent statute (38 Geo. 3, c. 5) the fact that other land had since been applied to the same charitable purposes, and the original land had been, by order of the Court of Chancery, directed to be held by the trustees of the charity to their own use, freed from its charitable trusts, did not, without more, render it liable, even in the hands of a tenant, to the taxation from which it had been previously exempt. Cox *v.* Rabbits - **H. L. (E.) 473**

LANDLORD AND TENANT—Poor-rate—Deduction—Mine - - - - **933**
See Poor-rate.

—— Waste - - - - - **709**
See Waste.

LEASE—Improbative deed—Scotch law - **582**
See Scotch Law. 6.

—— Mine—Forfeiture - - - **165**
See Railway. 1.

—— *Queensland* Leasing Act - - **115**
See Queensland, Law of. 1.

—— Waste—Long term of years - - **709**
See Waste.

LEGISLATURE—*India*—Power of - - **889**
See Indian Law.

LETTERS—Contract by - - - **1124**
See Vendor and Purchaser.

LEVEL CROSSING—Private railway - **1082**
See Statutory Obligation. 2.

LICENCE—Stamps—Canadian Law - 1090
See Canada, Law of. 6.

LIEN—Vendor of goods - - - 319
See Sale of Goods. 2.

LIMITATIONS—STATUTE OF—*Will—Charge—Express Trust.*] *J. F.* made a will in 1818 in which he said, "I leave and bequeath all my estate and property, real, freehold, and personal of every kind, save and except such parts thereof as are hereby otherwise specifically devised," to *Shaw* and *Franks*, "upon trust for the several uses, intents, and purposes hereinafter mentioned"; he then gave an annuity to his wife during her viduity payable out of the profits of his business, and out of all profits of every part of his estate and property, and directed his three eldest sons *L.*, *J.*, and *S.* to manage his business (at that time a very profitable one); he left specific legacies to his other children; he bequeathed to *L.*, *J.*, and *S.* all the property of every sort then employed by him in carrying on his business; then directed a sale of a certain estate and the investment of the produce thereof to accumulate until all the provisions of his will were carried into effect, and then to go to *L.*, *J.*, and *S.* After other specific bequests the will went on, "Whereas I am possessed of grounds in the county of *Carlow* called *Seskin Ryan*," and of the ground rent of houses in *Sackville Street*, and he directed that the rents, &c., of *Seskin Ryan* should be paid to his wife for her life, "and after her death I give the said lands of *Seskin Ryan* to my eldest son *L.*, his heirs and assigns," and the ground rents "to *J.* and *S.*, their heirs and assigns"; and he directed that "all said bequests shall stand and hold good to *L.*, *J.*, and *S.* only on condition of well and truly paying the several legacies herein directed, and discharging with fidelity the different trusts of this will committed to them." The testator died in 1824. The business fell off, the payment of the annuity was not kept up, but considerable arrears accrued; the last payment of any sort was made in 1862. The widow died in 1865, and by her will bequeathed all her property (including the arrears of the annuity) to her youngest daughter, who died in October, 1873, without having received any portion of the arrears. *L.*, who, on his mother's death, had entered into possession of *Seskin Ryan*, died in January, 1873, and the administrators of the youngest daughter filed their bill in July, 1875, against his representatives to recover the arrears of the annuity out of the lands of *Seskin Ryan*, which they insisted were held subject to a trust for satisfaction of the annuity:—*Held*, that the words of the will did not create a trust with regard to the lands of *Seskin Ryan*, for the payment of the annuity, and that the claim to the arrears was therefore barred by 3 & 4 Will. 4, c. 27, s. 42.—*Quære*, whether the word "legacies" as used in this will, would include the annuity.
Cunningham *v.* Foot - H. L. (I.) 974

MANDAMUS—Master in Equity in *Victoria*—Public duty - - - - 355
See Victoria, Law of. 2.

MINE—Compensation under Railways Clauses Act - - - - - 165
See Railway. 1.

MINE—*continued.*
—— Poor-rate—Deduction by tenant - 933
See Poor-rate.
—— Roman-Dutch law - - - 908
See Griqualand, Law of.

MISREPRESENTATION—Agent—Liability of principal - - - - 106
See Principal and Agent. 1.

MOTION—New trial—Explanations by Judge
See Practice. 2. [483

NEGLIGENCE—*Railway—Evidence of Negligence.*] Whether there is reasonable evidence to be left to the jury of negligence occasioning the injury complained of, is a question for the Judge. It is for the jury to say whether, and how far, the evidence is to be believed.—*J.* was a passenger by a railway; the carriage in which he rode was full. At station *G.* three persons forced themselves in, and were obliged to stand. There was no evidence that a complaint on this matter had been made to the railway officials, or that they knew of the fact. At station *P.* some other persons opened the door of the carriage, shut it again, and went away. There was, afterwards, a rush on the platform, and other persons opened the door of the carriage. *J.* stood up to prevent their entering, the train moved; *J.*, to save himself from falling, put his hand upon the edge of the door of the carriage; at that moment a railway porter came up, pushed away the persons trying to get in, and slammed the door to, in doing which *J.*'s thumb was caught and crushed:—*Held*, that this evidence did not establish such negligence on the part of the company as could be said to have occasioned the mischief, and the Judge ought so to have directed the jury.—Misapprehension as to *Bridges* v. *The North London Railway Company* (Law Rep. 7 H. L. 213) corrected. Metropolitan Railway Company *v.* Jackson
[H. L. (E.) 193

2. —— *Railway—Injury—Evidence—Question for Jury.*] Where there is conflicting evidence on a question of fact, whatever may be the opinion of the Judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury.—*S.* went to the *Dublin and Kingstown* railway station to accompany a relative who was going by the up train to *Dublin*. It was necessary to cross the line in order to get the ticket. *S.* went through a gate, down a pathway, and across the line in front of the train going to *Dublin*, which was then slowly approaching the station from *Kingstown*. The time was night. There were notice boards warning persons not to cross the line at that point, but there was evidence that the railway servants never interrupted any persons who did cross the line there. *S.* crossed in safety—he obtained a ticket for his relative, who with two friends, was standing on the bank by the side of the up line. The train to *Dublin* had, in the meantime, arrived, and was standing still. *S.* having got the ticket began to recross the line, being then, not in front of the *Dublin* train, but behind it, in consequence of which that train prevented him seeing anything on the down line from *Dublin;* and he moved on. As he was going on the down line (which ran from

NEGLIGENCE—*continued.*

Dublin to *Kingstown*), the down express train caught him and he was killed. It was a rule of the railway that the express train should always sound a whistle on approaching the station, and the driver of that train swore that he had whistled twice, and some other servants of the railway company swore that they had heard the whistling. The friends of *S.* had, in their evidence for the Plaintiff, sworn that they were in a situation to hear the whistle if it had been sounded, and that they had not heard it: and one of them who could see the down train approaching, swore that he heard the "rumbling" of the approaching train, but heard no whistle:—*Held*, that this was a case which was properly left to the jury, for that where there was contradictory evidence on facts, the jurors and not the Judge must decide upon them:—*Diss.* Lords *Hatherley*, *Coleridge*, and *Blackburn*, who thought that when there was not, in the first instance, uncontradicted evidence to establish the right of a Plaintiff to a verdict, the Judge might direct a nonsuit or a verdict for the Defendant, and that there was here enough to shew, even on the undisputed facts, that the mischief had been the result of *S.'s* own negligence, and that a nonsuit or a verdict for the Defendants ought to have been directed.—Where notices have been put up by a railway company forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices by way of answer to an action for damages for such injury.—Under the circumstances of the case the appeal was dismissed without costs. Dublin, Wicklow, and Wexford Railway *v.* Slattery H. L. (I.) 1155

—— Statutory obligation - - 430, 1082
See Statutory Obligation. 1, 2.

NEW SOUTH WALES—Domicil - - 337
See Domicil.

—— Law of—Banker - - - 325
See Banker.

NOTICE—Dishonour of promissory note - 325
See Banker.

OBSTRUCTION—Salmon—Erection on foreshore
See Scotch Law. 8. [736

PAID-UP SHARES—Estoppel - - 1004
See Company. 2.

PAROL EVIDENCE—Scotch law—Previous communings - - - - 552
See Scotch Law. 3.

PARTNERSHIP—Proof in bankruptcy - 94
See Bankruptcy. 3.

PASSENGER—Railway—Injury—Negligence
See Negligence. 1. [193

PATENT—*Infringement of—Appeal—Practice.*] When a combination of instruments is the invention patented, an infringement of the patent must be an infringement of the combination.—A patentee having altered his specification by disclaimer, lodged a complaint against certain manufacturers

PATENT—*continued.*

for breach of an interdict granted anterior to the disclaimer:—*Held*, that the patentee ought to have instituted a new action; and that, although the instrument of the manufacturers was intended to execute the same work, it was no infringement; Lord *Cairns*, L.C., observing that although it was cognate, it had not the characteristic feature of the patentee's invention.—*Per* Lord *Cairns*, L.C.: The Appellant's invention as it stood before the disclaimer may have been new, useful, and legal, but it might not have been so under the altered specification. After the disclaimer the question of enforcing the old interdict could not be entertained.—*Per* Lord *Blackburn*: The phrase "colourably" is very apt to mislead in these cases. If part of the property in the invention be really taken, there is an infringement, however much that may be disguised. What is claimed here is the "combination" of three instrumentalities, which are all that are absolutely essential.—Notwithstanding an irregularity through inadvertence in the Court below, the House, by the desire of both parties, to stop litigation, reviewed the judgment complained of. Dudgeon *v.* Thomson - H. L. (Sc.) 34

2. —— *Knowledge of Public Officers—Public Property.*] If an invention becomes (without fraud) known to the public, no subsequent patent can be granted for it. It is not necessary that it should have been used by the public, as well as known to the public.—Where a Report, on a particular subject, is made to a public office, by referees specially appointed under an Act of Parliament to inquire into and report on such subject, the knowledge contained in that Report being fully possessed by the referees, it must, from that moment, be treated as absolutely the property of the public and as being publicly known, although, in fact, the Report was not formally published till some days afterwards.—If the knowledge thus obtained in the course of the discharge of his duty by one referee, was, by his communication of it to his colleagues, possessed by all the referees, the moment they became possessed of it, it became public property, and they had no power whatever to agree among themselves to treat its communication as confidential, nor would their doing so enable one of their number to take out a patent in regard to it. Patterson *v.* Gas Light and Coke Company - - H. L. (E.) 239

3. —— *Provisional and Complete Specification—Want of Conformity—Anticipation—Insufficient Description of the manner of Use—Statute* 15 *&* 16 *Vict. c.* 83.] The provisional specification of a patent stated the object of the invention to be the preserving of animal substances in a fresh state; and the patentees claimed the use of a solution composed of a certain quantity of gelatine mixed with bisulphite of lime, but in the complete specification, lodged six months afterwards, they claimed as "solution No. 1," a solution composed of bisulphite of lime alone; and gave no direction how this solution was to be used. Bisulphite of lime had been used by a prior patentee. In an action for infringement against Defendants who had used bisulphite of lime pure and simple, *held*, that the complete specification, if large enough to cover the employment of bisulphite of lime for the

PATENT—*continued.*
preservation of animal substances as practised by the Defenders, would claim an invention larger than and different from that disclosed in the provisional specification, and would be open to the objection of want of novelty, and of want of a sufficient description of the manner in which the invention was to be performed, that therefore the patent was not valid and effectual to secure to the patentees the invention, or supposed invention, used by the Defenders, though it might be valid to secure to them the invention described in the provisional specification. Bailey *v.* Roberton [H. L. (Sc.) 1055

PAYMENT — Appropriation of—Civil Code of *Canada* - - - - 345
See Canada, Law of. 1.

PEWS—Scotch church - - - 14
See Scotch Law. 2.

POOR-RATE—*Taxes—Deduction*—37 & 38 *Vict. c.* 54.] A lease of an iron mine, made in 1855 (not being then liable to poor-rate), contained covenants for the payment of certain rents and royalties, and these payments were to be made free and clear of all rates and taxes imposed by parliament or otherwise . . . . "free from all deductions whatsoever;" and there was a covenant to pay "all manner of taxes, &c., which now are or which shall at any time hereafter, during the continuance of this demise, be imposed," landlord's property tax excepted. By the *Rating Act* of 1874, 37 & 38 Vict. c. 54, s. 3, the 43 Eliz. c. 2, was extended to mines "of every kind not mentioned in the recited Act," but the 8th section provided that where the lessee of a mine was, at the commencement of the Act, exempt from the payment of poor-rate, which was afterwards made payable, he might deduct one-half from the rent "(unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption):"—*Held*, that under this section the tenant here might deduct half of the rate from his rent, for that he had not, within the words of the section, "specifically contracted" to pay such rate. Chaloner *v.* Bolckow H. L. (E.) 933

—— Scotch law - - - - 1298
See Scotch Law. 7.

POSSESSION—Vendor's lien - - 319
See Sale of Goods. 2.

PRACTICE—*Costs—Slander—Statute of James—The Judicature Acts, Order* LV.] The statute 21 Jac. 1, c. 16, is (so far as the action for slander is concerned) repealed by the effect of Order LV. made under the authority of the Judicature Act of 1875 (38 & 39 Vict. c. 77).—Where, therefore, a Plaintiff in an action for slander obtained a verdict, but recovered only one farthing damages, and the Judge declined to make any order or grant any certificate, and the Master taxed the costs for the Plaintiff in the ordinary way,—*Held*, that the Master was right—the costs under such circumstances following "the event."—*Per* Lord *Blackburn:* Any Act which gives the Judges power to exercise their judicial discretion in every case as to costs, of necessity repealed previous Acts, which directed costs to follow certain rules, and gave the Judges no discretion whatever in the

PRACTICE—*continued.*
matter.—*Parsons* v. *Tinling* (2 C. P. D. 119) approved.—An order, made on an application with reference to the taxation of costs, granted leave to appeal, and reserved the costs of the litigation for the Court of Appeal:—*Held*, that the costs thus reserved ought to be dealt with in the same manner as the costs of the appeal—and the judgment of the Court of Appeal being reversed in this House, the Respondent was ordered to repay the costs which he had received under the order now reversed. Garnett *v.* Bradley H. L. (E.) 944

2. —— *Motion for New Trial—Explanation by Judge.*] At the trial the cause had been withdrawn from the jury and submitted to the decision of the Judge. On a motion that the verdict should be entered for the Plaintiffs, or a new trial granted, on the ground that the representation, by the defendant, of part of the Plaintiffs' play had been found as a fact, the Judge (who was a member of the Court where the case was pending) explained to his brethren on the Bench what was the meaning he intended to convey by the finding:—*Held*, that it was competent for him to do so. Chatterton *v.* Cave H. L. (E.) 483

—— Scotch law—Arrest of foreign ship at sea—Re-arrest - - - 1316, 1322
See Jurisdiction. 1, 2.

PREROGATIVE OF CROWN—Appeal from Supreme Court of *Canada* - - 159
See Canada, Law of. 5.

PRESCRIPTION—Salmon Fishery - - 1
See Scotch Law. 9.

—— Teinds - - - - - 765
See Scotch Law. 12.

PRINCIPAL AND AGENT—*Fraudulent Misrepresentation by an Agent—Liability of Principal for Moneys wrongfully received by his Agent.*] *S.*, being employed by the Respondent to carry on his business, credited the Respondent in account with the Appellants with the sum of 5800 taels, which he falsely represented to have been advanced in the ordinary course of business on certain goods intended for shipment. He then drew a bill in the name of the Respondent's firm on the Appellants for the balance of account, and having received the proceeds of such bill, including the said 5800 taels, appropriated them to his own use. —On a special case submitting whether the Respondent was liable to the Appellants in the said sum with interest from date of receipt by *S.*, *held*, that the proceeds of the bill having been received as aforesaid by *S.* acting throughout within the scope of his authority, belonged to the Respondent; and that he having thus been paid 5800 taels without consideration the Appellants were entitled to recover back the same.—*Barwick* v. *The English Joint Stock Bank* (Law Rep. 2 Ex. 259), and *Mackay* v. *The Commercial Bank of New Brunswick* (Law Rep. 5 P. C. 412) approved. Swire *v.* Francis - - - P. C. 106

2. —— *Indemnity — Commission Agent.*] *Quære*, whether a commission agent is entitled to be indemnified out of the proceeds of his principal's goods sold by him against all liabilities incurred by him on account of his principal, including the amount of an accommodation bill

PRINCIPAL AND AGENT—*continued.*
drawn by the principal and accepted by such agent. Hood *v.* Stallybrass, Balmer, & Co. [P. C. 880
—— Purchase by agent - - - 254
See Scotch Law. 11.
PRIOR USER—Patent - - - 239
See Patent. 2.
PROBATE DUTY—Law of *Victoria* - 355
See Victoria, Law of. 2.
PROMISSORY NOTE—Notice of dishonour 325
See Banker.
PROMOTER—Company—Fiduciary relation 1218
See Company. 1.
PROOF—Bankruptcy—Joint and separate estate
See Bankruptcy. 3. [94
PROPERTY—Passing of - - - - 459
See Sale of Goods. 1.
PROVINCIAL LEGISLATURE—Powers of 1090
See Canada, Law of. 6.
PROVISIONAL SPECIFICATION - - 1055
See Patent. 3.
PUBLIC OFFICER—Disqualification from taking out patent - - - - 239
See Patent. 2.
PURCHASE BY AGENT—For his own benefit
See Scotch Law. 11. [254

QUEENSLAND, LAW OF—*Queensland Agricultural Reserves Act of* 1863, *s.* 8—*Leasing Act of* 1866—*Lease—Forfeiture—Waiver—Rent received under Protest.*] A lease of Crown lands for eight years having been granted by the Respondent under 31 Vict. No. 46, subject to the terms and conditions contained in the *Agricultural Reserves Act* of 1863 and the *Leasing Act* of 1866, the lessee failed to perform his covenant to cultivate one-sixth of the said lands within a year from the allotment thereof. Rent, however, for the whole term of years was subsequently received by the Government, the latest being in 1873, with full knowledge of the above breach of covenant, but after notification in the *Gazettes* of 1869, 1870, and 1871, that the same would be received conditionally and without prejudice to the rights of the Government:—*Held*, in ejectment brought by the Respondent, that whether or not a valid grant could be made to a selector failing to perform the condition under sect. 8 of the *Agricultural Reserves Act*, the same section read into the above lease does not render it void, but voidable at the option of the lessor, on breach of condition by the lessee. —*Held*, further, that assuming a forfeiture had accrued, it was waived by the receipt of rent, notwithstanding the notifications.—Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to the right to insist upon a prior forfeiture cannot countervail the fact of such receipt. Davenport *v.* The Queen **P. C. 115**

2. —— *Crown Lands Alienation Act*, 1868—*Grant in Fee refused—False Declaration by Applicant for Lease.*] In a suit by the Appellant praying for a declaration that a valid and binding statutory engagement subsisted between the Government and himself for the grant in fee simple of certain land which had been previously

QUEENSLAND, LAW OF—*continued.*
leased to him, and further praying that the Government might be decreed to issue a deed of grant to him; it appeared that the Appellant had complied with the conditions of sect. 51, sub-sects. 6 and 7 of the *Crown Lands Alienation Act*, 1868 (which provide for an acceleration of the right to a grant in fee) but that the declaration that he lived in *Queensland* made on his application for the lease was untrue to his knowledge:—*Held*, that the Government was right in withholding the grant. The declaration formed one of the bases on which the contract was founded; and there was no evidence that the Government knew it to be untrue either at the time the lease was granted or when the rents were received.—*Quære*, whether a selector who has obtained a Commissioner's certificate that he has fulfilled the conditions of sect. 51, sub-sects. 6 & 7, and has made the payments prescribed by sub-sect. 9, can sue as above without offering to prove to the Governor in Council under sect. 57 his compliance with the conditions of his lease. Fisher *v.* Tully **P. C. 627**

3. —— *Crown Lands Alienation Act*, 1868, *s.* 55, *s.* 51, *sub-s.* 5—*Residence—Abandonment—Forfeiture—Judicial Inquiry by Commissioners.*] Sect. 55 of the *Crown Lands Alienation Act*, 1868, exempts selectors of additional selections from residence upon them; but *quære*, whether a certificate under sect. 51, sub-sect. 7, exempts the holder from further residence after the date of it. —In order to prove either non-residence or an abandonment under sect. 51, sub-sect. 5, an inquiry thereunder in the nature of a judicial inquiry must be made by the Commissioner, conducted according to the requirements of substantial justice. Smith *v.* The Queen **P. C. 614**

RAILWAY — *Compensation — Mine — Unworked Minerals—Injunction — Lease—Forfeiture—Surrender*—8 & 9 *Vict. c.* 20.] In claims for compensation for not working mines adjoining a railway and railway works, the 6th and 78th sections of the *Railways Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 20), must be read together.—The 6th section gives a general right to compensation to "owners and occupiers of, and all other parties interested in, lands taken or injuriously affected by the construction" of the railway.—In the 78th section, the person entitled to give notice to the directors of a railway company of his intention, within thirty days, to work a mine is the "owner, lessee, or occupier," who has the right and the power to work it—the directors are entitled to have an inspection of the mine, and to offer compensation to him for not working, which compensation may be settled as therein mentioned. The compensation thus settled is that to which he is individually entitled, according to the extent of his interest. If the lessee is the person thus giving notice, and receiving compensation, the owner, if he can shew a right of his own beyond that of his lessee who has been compensated, is also entitled to compensation under the 6th section.—The words "he" and "his," in two of the parts of the 78th section refer to the person entitled to compensation, whether owner, lessee, or occupier.—The word "lands" in the 6th section includes mines; and that section, in

RAILWAY—*continued.*
regard to the compensation thereby provided, is to be read with reference to the *Lands Clauses Consolidation Act*.—After compensation agreed on, and obtained or tendered, a perpetual injunction may be granted against the working of the mines.—Where a lessor claimed as for forfeiture for breach of covenant to re-enter on mines demised, but a compromise was effected and the lease surrendered, the lessor was recognised as a reversioner; and his subsequent sale of the fee *held* to convey to his vendee all the rights of an original owner.—*R.* was the owner of lands with coal and ironstone under them. The surface of a portion of the lands (about 4½ acres), had already been conveyed to a railway company, and a railway and railway works had been constructed thereon. The mines had not been conveyed. *R.*, by a verbal agreement, afterwards converted into a lease, let into possession *H.*, who was to work the mines, and, under the name of an acreage royalty or rent, was to pay a sum of £150 an acre for each of the 4½ acres until the money paid reached an amount which was the calculated value of the minerals in that part of the mine. Had this lease been, in fact, duly followed, there was time enough for the tenant to work out all the minerals in the 4½ acres. It was not followed. *H.* gave notice (under the 78th section of the *Railways Clauses Consolidation Act*) to the railway directors of his intention to work the mine under the 4½ acres. The directors (though not within the time mentioned in the statute), gave a counter notice, obtained an inspection of the men, and agreed with *H.* as to his compensation. In the agreement *H.* covenanted to pay the £150 royalty acreage, and to use his best endeavours to facilitate the settlement of his lessors' compensation. He did neither; he died insolvent, having received from the directors different portions of his compensation. His executors at first worked the mine, but were accused by the lessors of repeated breaches of covenant, and on a bill being filed against them, compromised the matter by surrendering the lease of the whole colliery, the 4½ acres being therein included. The minerals under the 4½ acres had not then been fully worked out. The lessors sold the fee of the whole mine to *S.* Both they and *S.* were ignorant of the dealings which had taken place between the directors and *H.* *S.* gave notice to the directors of his intention to work the mine under the 4½ acres, they gave a counter-notice, and offered to pay him such compensation as he might be found entitled to, having regard to that which had already been paid to *H.* *S.* refused to treat with them on that footing. They filed a bill to restrain him from working, and in the bill made the same qualified offer of compensation:—*Held*, that, on these terms they were entitled to a perpetual injunction.—*Held*, also, that, as in their bill they had made this offer of compensation, they were entitled to the costs of the appeal. Smith *v.* Great Western Railway Company [H. L. (E.) 165

2. —— *Inequality of Charges—Undue Preference—Toll—Money had and received.*] The 90th section of the 8 & 9 Vict. c. 20 (*Railways Clauses Consolidation Act*, 1845), requires equality of tolls for similar services rendered by railway companies to all persons; and s. 2 of the 17 & 18 Vict. c. 31 (*Railway and Canal Traffic Act*, 1854), forbids the giving of any undue or unreasonable preference or advantage to any particular person or company. A charge made by a railway against *A.* for services rendered by that company to him must not, therefore, be greater than the charge made by the same company against *B.* for rendering him services of the like nature.—*E.* was a brewer at the town of *B.*, where three railways had their stations. With one of those railways, *M.*, certain brewers in the town had direct communication by sidings, which enabled goods to be sent to the trains, and taken from the trains of Railway *M.* with greater ease and less loss of time than by the way of ordinary cartage. *M.* charged them nothing for cartage, and made a rebate in the charge for station to station conveyance. These brewers had no such communications with Railway *N. W.*, but it was often convenient for them to send by that railway; and the directors of that railway, in order to compete with Railway *M.*, allowed these particular brewers the same advantages as to cartage and rebate as Railway *M.* did. As to all others in the same trade (*E.* among the rest), the directors of railway *N. W.* made the ordinary charge for cartage, and allowed no rebate on the charge for conveyance on the line:—*Held*, that this was an inequality and an undue preference within the meaning of the statutes.—Where *E.*, one of the persons thus paying the higher rate, had for some time paid it in ignorance of the facts, but afterwards, on finding that he was subjected to this higher charge, paid it under protest:—*Held*, that he was entitled to recover back, in an action for money had and received, the difference he had so paid under protest. London and North-Western Railway *v.* Evershed - - - - H. L. (E.) 1029

—— Negligence—Evidence - - 193, 1155
See Negligence. 1, 2.

—— Private—Level crossing - - 1082
See Statutory Obligation. 2.

RE-ARREST—Foreign ship—Jurisdiction 1322
See Jurisdiction. 2.

RE-EXCHANGE—Dishonour of bill - 133
See Bill of Exchange.

RIPARIAN OWNER—Inland lake—Lakes connected by channel - - - 1324
See Lake. 2.

—— Scotch law - - - - 529
See Scotch Law. 5.

RIVER—Navigable—Riparian owner—Scotch law
See Scotch Law. 5. [529

—— Salmon fishery - - - - 1
See Scotch Law. 9.

ROAD ASSESSMENT—Scotch law - - 1298
See Scotch Law. 7.

ROMAN-DUTCH LAW—Minerals - - 908
See Griqualand, Law of.

ROYAL CHARTER—Charter by progress - 297
See Scotch Law. 4.

RULES OF SUPREME COURT, 1875, Order LV.
See Practice. 1. [944

SALE OF GOODS—*Contract—Fraud—False Pretences—Passing of Property.*] The purchaser of a chattel takes it, as a general rule, subject to what may turn out to be informalities in the title.—By a purchase in market overt the title obtained is good against all the world—If not so purchased, though purchased *bonâ fide*, the title obtained may not be good against the real owner.—Where the original owner has parted with the chattel to *A.* upon a *de facto* contract, though there may be circumstances which enable that owner to set aside that contract, the *bonâ fide* purchaser from *A.* will obtain an indefeasible title.—The question, therefore, in many such cases will be, was there a contract between the original owner and the intermediate person.—*L.* was a manufacturer in *Ireland; Alfred Blenkarn*, who occupied a room in a house looking into *Wood Street, Cheapside*, wrote to *L.*, proposing a considerable purchase of *L.'s* goods, and in his letter used this address—"37, *Wood Street, Cheapside*," and signed the letters (without any initial for a christian name) with a name so written that it appeared to be "*Blenkiron & Co.*" There was a respectable firm of that name, "*W. Blenkiron & Co.*," carrying on business at 123, *Wood Street*. *L.* sent letters, and afterwards supplied goods, the letters, the goods, and the invoices accompanying the goods, being all addressed to "Messrs. *Blenkiron & Co.*, 37, *Wood Street*." The goods were received by *Blenkarn* at that place, and disposed of to the Defendants, who were entirely ignorant of the fraud:—*Held*, that no contract was made with *Blenkarn*, that even a temporary property in the goods never passed to him, so that he never had a possessory title which he could transfer to the Defendants, who were consequently liable to the Plaintiffs for the value of the goods. Cundy *v.* Lindsay - - - H. L. (E.) 459

2. —— *Insolvency of Purchasers — Lien of Vendors who are also Warehousemen for their Purchasers.*] Unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignees of the purchaser, in the event of his insolvency.—Where the vendors were also warehousemen of the goods sold under an arrangement with the purchasers to pay warehouse rent:—*Held*, that, as the goods remained in the possession of the vendors and no actual delivery had been made to the purchasers, the vendors' lien revived upon the insolvency of the vendees. Grice *v.* Richardson - - P. C. 319

SALMON FISHERY - - 1, 736
See Scotch Law. 7, 8.

SCHOOL—Endowed Schools Act - 857, 872
See Endowed Schools Act. 1, 2.

SCOTCH LAW—*Administration—Will—Trust—Unlimited Discretionary Power of Trustees to postpone Payments—Arrestment by Creditors ineffectual to bar the exercise of the Trustee's Power.*] Where trustees have an unlimited discretionary power to postpone, as long as they think fit, the payments of shares of a residuary fund; and where of the *time* and *manner* of exercising the power they are to be the sole and final judges, arresting creditors of the fund will be defeated by the trustees executing, even after action raised, a deed applying the fund as an alimentary provision for the behoof of the beneficiaries. No proceedings resorted to by creditors of the beneficiaries can in such a case abridge the powers of the trustees.—A testator directed his trustees to hold the residue of his estate for the behoof of his children, "with and under the modifications to be afterwards stated." The shares of residue were to vest at the testator's death, and be payable six months after his decease; but powers were given, "notwithstanding the period above appointed for payment of the shares of the residue," to the trustees "to postpone as long as they should think it expedient to do so, the payment of the provisions or shares of residue in the case of all or any of the children or grandchildren . . . and to apply the interest or annual produce of the same during the period of the postponement, to or for behoof of such children or grandchildren, or, by a deed under their hands, to retain the said provisions, or any of them, vested in their own persons, or to vest the same in the persons of other trustees . . . so that the children and grandchildren, or any of them, as the case might be, might draw and receive only the interest or other annual proceeds of their respective provisions during their lives, or for such time as the trustees might fix, and that the capital might be settled on or for behoof of such children or grandchildren, and their lawful issue, on such conditions and under such restrictions and limitations, and for such uses as the trustees in their discretion might deem most expedient, of which expediency, and the time and manner of exercising the powers and option hereby given, they should be the sole and final judges."—The trustees during a period of five years after the testator's death paid the whole of the interest, and a part of the capital of his share to *J. C.*, a son of the testator. Subsequently judgment creditors of *J. C.* used arrestment in the hands of the trustees against the balance of the residue of his share still due to *J. C.*, and raised an action of forthcoming. Thereupon the trustees executed a deed restricting the right of *J. C.* to a life rent, and settled the fee on his children; and again by another deed they resolved to hold the balance, and apply the interest as an alimentary fund for *J. C.'s* behoof:—*Held*, reversing the decision of the Court below, that the arrestment could not in any way abridge the ample discretionary powers of the trustees; and that the trustees were at liberty to withhold from *J. C.*, or any one claiming under him, the payment of either principal or interest as they might think occasion required.—*Per* Lord *O'Hagan*:—The *mere* declaration of the trustees' resolution to postpone, however made, is sufficient to render the fund unattachable by creditors. Chambers *v.* Smith - H. L (Sc.) 795

2. —— *Church—Allocation of Area and Seats in a new Church—Effect on Heritors disjoined Quoad Sacra.*] If specific legal rights have been previously established, these will be duly regarded and preserved in the new allocation of area and seats.—The heritors of a parish disjoined *quoad sacra* are to be regarded as still retaining their original civil rights, and continuing still subject to their original civil liabilities, notwithstanding the disjunction. Duke of Roxburghe *v.* Millar [H. L. (Sc.) 14

SCOTCH LAW—*continued.*

3. —— *Contract, Construction of — Deleted Words—Evidence of Intention by previous Communings — Ship's Survey Expenses.*] A firm of shipbuilders agreed to lengthen and repair an iron steamship; the object being that she might be classed 100 A 1 at *Lloyd's*. The specification forming part of the contract contained this stipulation, "*Iron work:*—The plating of the hull to be carefully overhauled and repaired, *but if any new plating is required the same to be paid for extra* (fourteen words deleted, signed *A.* and *J. I., D. G.*). Deck beams, ties, diagonal ties, main and spar deck stringers, and all iron work, to be in accordance with *Lloyd's* rules for classification:"—*Held*, affirming the decision of the Court below, that the shipbuilders were bound to supply without extra charge any new plates required to enable the vessel to be classed 100 A 1 at *Lloyd's;* and that neither the letters of the parties before the contract was signed, nor the initialed deleted words in the contract, could be considered for the purpose of interpreting the intention of the parties:—*Held*, reversing the decision of the Court below, that the costs of *Lloyd's* survey, and the Board of Trade tonnage measurement, should be borne by the shipowner. Inglis *v.* Buttery [H. L. (Sc.) 552

4. —— *Entail—Royal Charter by Progress—Act* 1690, *c.* 33.] A royal charter, not original, but by progress, and unrecorded, held not to have given substitute heirs of entail the benefit of the Act 1690, c. 33, which would otherwise have saved them from the penalties of their predecessor's treason. *Per* Lord *Cairns*, L.C.:—The Appellant founds on the Crown charter that followed the procuratory of resignation, and he argues that this is to be looked at as a fresh grant from the Crown, and that as it contains a clause shifting the estate upon the treason of any holder to the next in succession, he can get rid of the consequence of the attainder without resorting to the Act of 1690. Speaking for myself, I should have required much stronger authority than any which was produced to satisfy me of the validity of such a clause: for I entirely agree with the learned Judges of the Court of Session that the charter of 1687 was not, and was not intended to be, an original royal grant. Earl of Perth and Melfort *v.* Lord Elphinstone - H. L. (Sc.) 297

5. —— *Glasgow Police Act*, 1866 (29 & 30 *Vict. c.* 273)—*Obligation to fence tidal and navigable River—Riparian Proprietor.*] By the *Glasgow Police Act*, 1866 (29 & 30 Vict. c. 273), section 384, the Master of Works may by notice "require any proprietor or occupier of a land or heritage" within the city, "to fence the same, or repair any chimney-stalk or flue, or chimney-head or can, or any rhone, signboard, or other thing connected with or appertaining to any building thereon, which appears to be dangerous":—*Held*, affirming the decision of the Court below, that the statute gave no power to the Master of Works in *Glasgow* to compel a riparian proprietor to fence his land off from a tidal and navigable river, although a right of way gained by the public along the river bank, and fenced on the land side, was alleged to be insecure and dangerous, on account of the

SCOTCH LAW—*continued.*

proximity of the river. Lang *v.* Kerr, Anderson, & Co. - - - - H. L. (Sc.) 529

6. —— *Lease — Improbative Deed — Statute* 1696, *c.* 15, *and the Conveyancing (Scotland) Act*, 1874 (37 & 38 *Vict. c.* 94), *ss.* 38, 39.] An agreement for a lease was dated the 7th of June, 1873, and consisted of two sheets of paper written bookwise on seven pages. Only the last page was subscribed by the full names of the grantors, the previous six pages being initialed:—*Held*, affirming the decision of the Court below, that the agreement was improbative under the Statute 1696, c. 15, which in effect requires that, where a deed consists of more than one page, each page shall be attested in the same manner by the grantor with his usual and accustomed form of signature:—*Held*, also, that the 38th and 39th sections of the *Conveyancing (Scotland) Act*, 1874, which dispensed with several requirements essential to the validity of writs in *Scotland* under previous statutes, were not retrospective, and could not remedy the defects in a deed executed before 1874, which was void under the Act, 1696, c. 15. Gardner *v.* Lucas - H. L. (Sc.) 582

7. —— *Salmon Fishing — Statutes — Superior and Inferior Heritors — Erection on Foreshore improving Fishing.*] A proprietor of salmon fishings in an estuary opposite his estate, restored the foreshore by an embankment 16 inches higher than the original, which had been swept away by the tide, and this he did for the legitimate purpose of confining the river to its proper channel, and to protect his shore, and not as a device to obstruct or catch fish. The effect of thus raising the embankment was, not to prevent or to substantially impede the passage of salmon, although it did to some extent delay them and alter the course which they would take in ascending the the estuary, and so facilitated their capture by the proprietor:—*Held*, that the raising the embankment was not an illegal obstruction within the meaning of the Salmon Fishery Acts. Duke of Sutherland *v.* Ross - - H. L. (Sc.) 736

8. —— *Salmon Fishing — User—Prescriptive Possession.*] Case in which the House *held*, affirming the judgment of the Court of Session, that the Baroness *Gray* had the sole and exclusive right of salmon fishing in the *Tay ex adverso* of the *Meadow Pows* of *Inchyra*, in *Perthshire.*—Where a piece of land on the banks of a tidal river is exchanged, the right of salmon fishing therein being expressly reserved, a grant in 1873 of that salmon fishing, though from the Crown, will not deprive the prior owner of his right. Richardson *v.* Gray. Fleming *v.* Gray [H. L. Sc. 1

9. —— *Superior and Vassal — Feu-contract, Clause of Relief from Public Burdens—Poor-rates —Statute* 8 & 9 *Vict. c.* 83.—*Road Assessments—Statutes* 33 *Geo.* 3, *c.* 120; 11 *Geo.* 4, *c.* 102; *and* 23 & 24 *Vict. c.* 201.] A feu-contract, dated in 1823, of land feued out to the *British Fisheries Society* for the formation of a harbour and erection of buildings contained this obligation:—"Sir *Benjamin Dunbar*," the Superior, "binds and obliges himself and his foresaids to free and relieve the said society of the whole cess or land-tax,

SCOTCH LAW—*continued.*

feu-duties, or other duties payable to his, the said Sir *Benjamin Dunbar's*, superiors of the said lands, ministers' stipends, schoolmasters' salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming":—*Held*, affirming the decision of the Court below, that the Superior was bound to relieve the vassal of the whole of the poor-rates payable in respect of the lands and buildings erected thereon, imposed under the *Poor Law Amendment Act*, 1845; and that the superior's liability was not limited to the proportion of assessment effeiring to the feu-contract, or to the amount of the feu-duty.—The Superior held liable for the whole assessments though they exceeded the feu duties.—*Held*, that the Superior was not bound to relieve the vassal of the road assessments imposed under local Acts in 1830, 1838, and 1860, the burden existing at the date of the feu-contract having been changed by supervenient legislation.—*Scott* v. *Edmond* (1850; 12 D. 1077) commented on. Dunbar's Trustees *v.* British Fisheries Society **H. L. (Sc.) 1298**

10. —— *Settlement — Succession — Vesting — Intention of Testator.*] A testator directed his trustees to hold and apply the residue of his estate for behoof of his nieces and their children in certain proportions, viz.:—one-third to *A.* in life-rent, and her children in fee; one-third to *B.* in life-rent, and to her children in fee; and one-third to *C.*, *D.*, *E.*, and *F.* equally among them in life-rent, and to their children equally among them *per stirpes* in fee. He further provided that in case *A.* and *B.* died unmarried, or without issue, or in the event of such issue existing, but afterwards deceasing before attaining the years of majority, or being married, then the two-third shares destined to them and their issue should fall and accrue to *C.*, *D.*, *E.*, and *F.* and their children respectively in life-rent and in fee, and equally among them *per stirpes* as provided with respect to their own shares of the residue. *A.* and *B.* died without issue. *C.* died leaving one child, married, and of age, but who had died without issue before *A.* and *B.*:—*Held*, reversing the decision of the Court below, that the representatives of the child of *C.* were entitled to participate in the division of the fee of the two-third shares which were life-rented by *A.* and *B.*—*Per* Lord *Gordon*: There is no difference between the law of *England* and that of *Scotland* in the principles ruling the decision of this case. Taylor *v.* Graham **[H. L. (Sc.) 1287**

11. —— *Solicitor — Disguised Purchase by a Solicitor from his own Clients.*] An advocate in *Aberdeen* is the same as an attorney or solicitor elsewhere.—Hence when an *Aberdeen* advocate purchased, nominally for his brother, but really for himself, certain houses, the property of two ladies for whom he was agent, concealing from them the fact that he was buying for himself:—*Held* (reversing the decision appealed from), that the purchase could not be enforced.—*Per* Lord *Cairns*, L.C.: Assuming that in every respect this was a sale which might have been supported had the ladies been told that their agent was himself the purchaser, it cannot be supported, that

SCOTCH LAW—*continued.*

fact not having been disclosed. McPherson *v.* Watt - - - - **H. L. (Sc.) 254**

12. —— *Teinds—Interim Locality—Augmentation of Minister's Stipend—Claim for Repetition by overpaying Heritor — Prescription.*] If one heritor pays a larger and another a smaller share of a minister's stipend, or of any augmentation thereof, than they were respectively by law liable to pay, the under-paying heritor is liable in repetition to the over-paying heritor; but when an under-paying heritor has ceased to be one, either by death or by selling his land, he and his representatives are discharged by the negative prescription after the lapse of forty years from the time when he so ceased, unless the over-paying heritor, or his representatives, take some step within the forty years to interrupt the prescription.—Forty years after heritors, who had never paid any stipend at all, had sold their land and left the parish, a claim for repetition of teinds was brought against them by an over-paying heritor:—*Held*, reversing the decision of the Court below, that the long period of negative prescription prevailed, and barred any right to recoupment, notwithstanding the existence of an interim scheme of locality, during the period the non-paying heritors were parishioners.—*Weatherstone* v. *Marquis of Tweeddale* (12 Shaw, 1) distinguished.—*Per* Lord *Selborne*: The claim of the over-paying against the under-paying heritor is one which arises in contemplation of law, and is constituted as a legal cause of action at the time when each over-payment takes place, the law imputing to every heritor an obligation, at that time, to know and to pay the share of stipend properly appertaining to him, whether the amount of that liability was or was not then open to, or the actual subject of, controversy, either in the Teind Court or elsewhere. Davidson *v.* Sinclair - **H. L. (Sc.) 765**

13. —— *Tramway*—34 & 35 *Vict. c.* 89, *and* 37 & 38 *Vict. c.* 68—*Fare of Passengers.*] A tramway company scheduled to their Act of Parliament distinct agreements with municipal authorities not to charge tramway passengers above a fixed fare; but they afterwards obtained legislative authority to substitute omnibuses on certain routes in lieu of the tramways, and to charge a higher fare on these routes:—*Held*, that the company had no power to increase the fare of passengers using the tramways only. Edinburgh Street Tramways Company *v.* Torbain **[H. L. (Sc.) 58**

—— Foreign ship—Arrest at sea—Re-arrest *See* Jurisdiction. 1, 2. **[1316, 1322**

SEAWORTHINESS—Bill of lading - - **72**
See Ship.

SEIGNIOR—Feudal rights—*Lower Canada* **1102**
See Canada, Law of. 4.

SEVERAL FISHERY—Inland lake - **641**
See Lake. 1.

SHANGHAI—Principal and agent - - **106**
See Principal and Agent. 1.

SHARES—Insolvent shareholder—Option of assignee to reject shares - - **842**
See South Australia, Law of.

SHIP—*Special Bill of Lading—Implied Warranty of Seaworthiness—Question for Jury—Precedent Condition.*] Where special clauses in a bill of lading exonerate the shipowner from the liability of even the perils induced by the negligence of his servants, it is necessary that the jury should find whether the vessel was or was not seaworthy when starting on the voyage.—A cargo of wheat was shipped at the port of *New York* for conveyance to *Glasgow*, and a specially worded bill of lading contained clauses excepting "peril of the seas of whatever nature or kind soever and howsoever caused," including negligence of the crew. On the voyage the sea burst through an insufficiently fastened port-hole, damaging the cargo. A jury found by special verdict that this port-hole had been insufficiently fastened, but did not find whether this happened before starting on the voyage. The Court below entered up judgment for the shipowners. On appeal:—*Held*, that there was an implied engagement to supply a seaworthy ship:—*Held*, also, that the jury not having found whether the vessel started on her voyage in a seaworthy condition, there was no finding before the House for judgment to be entered; therefore the case must be re-heard in the Court below.—*Per* Lord *Cairns*, L.C.: There is in the bill of lading an engagement that the ship shall be seaworthy. Whether the ship was seaworthy was a question of fact which lay at the very root of this case; but no answer to this question was found in the special verdict; therefore there is no finding on which the judgment can be entered either way.—*Per* Lord *O'Hagan*: A shipowner who accepts goods, which he is to deliver in good condition, impliedly contracts to perform the voyage in a ship which is seaworthy.—*Per* Lord *Selborne*: All the perils which are excepted are perils subsequent to the loading of the wheat on board. Steel *v.* State Line Steamship Company [H. L. (Sc.) 72

—— Foreign ship—Arrest at sea—Re-arrest *See* Jurisdiction. 1, 2. [1316, 1322

—— Insurance - - - - 279
See Insurance.

SHIP-BUILDING CONTRACT — Construction — Scotch Law - - - - 552
See Scotch Law. 3.

SLANDER—Costs - - - - 944
See Practice. 1.

SOUTH AUSTRALIA, LAW OF—*South Australian Insolvent Act*, 1860, *Division VI.—Assignee in Bankruptcy—Transfer of Shares—Option of Assignee to accept or reject Shares—Liability of Transferor.*] Although the transferee of shares in a company formed under the *Companies Act*, 1862, who takes the beneficial ownership, is bound to indemnify the transferor against all liabilities in respect of them subsequent to the date of the transfer; yet in the case of such transferee taking such shares as assignee in bankruptcy, taking the bankrupt's whole estate by operation of law, or as trustee under the provisions of the *South Australian Insolvent Act*, 1860, he has the option of accepting or rejecting the same. Acceptance of the shares in the absence of any special act done in relation thereto is not constituted by the execution of the deed of transfer, the acceptance of the

SOUTH AUSTRALIA, LAW OF—*continued.*

trusts, and general action under them.—It seems to be quite contrary to the principle of the laws relating to bankrupts or insolvents that the assignees taking the property for division amongst the creditors should be liable, either personally or out of the assets of the estate, to indemnify the bankrupt or insolvent in respect of any claims to which he may have rendered himself liable in respect of a particular portion of the estate, and from which claims he has not been discharged by his bankruptcy or insolvency. Levi *v.* Ayres [P. C. 842

SPECIFICATION—Patent - - - 1055
See Patent. 3.

STAMPS—Canadian law - - - 1090
See Canada, Law of. 6.

STATUTE, SCOTCH, 1696, c. 15—Deeds - 582
See Scotch Law. 6.

STATUTES:

21 Jac. 1, c. 16—*Costs* - - - 944
See Practice. 1.

33 Geo. 3, c. 120—*Roads—Scotland* - 1298
See Scotch Law. 7.

11 Geo. 4, c. 102—*Roads—Scotland* - 1298
See Scotch Law. 7.

5 & 6 Will. 4, c. 50, s. 71—*Highways* - 1082
See Statutory Obligation. 2.

2 & 3 Vict. c. 45, s. 1—*Railways* - 1082
See Statutory Obligation. 2.

5 & 6 Vict. c. 55, s. 9—*Railways* - 1082
See Statutory Obligation. 2.

8 & 9 Vict. c. 20, ss. 6, 7, 8—*Railway Clauses*
See Railway. 1. [165

—— —— s. 90 - - - - - - 1029
See Railway. 2.

8 & 9 Vict. c. 33—*Railway Clauses—Scotland*
See Statutory Obligation. 2. [1082

8 & 9 Vict. c. 83—*Poor* - - - 1298
See Scotch Law. 7.

15 & 16 Vict. c. 83—*Patents* - - 1055
See Patent. 3.

16 & 17 Vict. c. 51—*Succession Duty* - 505
See Succession Duty.

17 & 18 Vict. c. 31, s. 2—*Railway Traffic* 1029
See Railway. 2.

17 & 18 Vict. c. 104, s. 514—*Merchant Shipping*
See Insurance. [279

23 Vict.—*South Australia* - - 842
See South Australia, Law of.

25 & 26 Vict. c. 104—*Indian High Courts* 889
See Indian Law.

23 & 24 Vict. c. 201—*Roads—Scotland* - 1298
See Scotch Law. 7.

25 & 26 Vict. c. 63, s. 54—*Merchant Shipping*
See Insurance. [279

27 Vict. No. 23—*Queensland* - - 115
See Queensland, Law of. 1.

27 & 28 Vict. c. 60—*Canada* - 148, 605
See Canada, Law of. 2, 3.

29 & 30 Vict. c. 56, s. 12—*Canada* - 605
See Canada, Law of. 3.

STATUTES—*continued.*

29 & 30 Vict. c. 273—*Police—Glasgow* - 529
See Scotch Law.

30 Vict. No. 12—*Queensland* - - 115
See Queensland, Law of. 1.

30 & 31 Vict. c. 3—*British North America* 1090
See Canada, Law of. 6.

30 & 31 Vict. c. 131, s. 25—*Companies* 1004
See Company. 3.

31 Vict.—*Queensland—Crown Lands Alienation* - - - - 627, 614
See Queensland, Law of. 2, 3.

32 & 33 Vict. c. 56—*Endowed Schools* 857, 872
See Endowed Schools Act. 1, 2.

32 & 33 Vict. c. 71, s. 92—*Bankruptcy* - 213
See Bankruptcy. 1.

—— —— s. 126—*Bankruptcy* - - 672
See Bankruptcy. 2.

34 & 35 Vict. c. 89—*Tramways* - - 58
See Scotch Law. 13.

35 Vict. c. 32—*Canada* - - - 148
See Canada, Law of. 2.

37 & 38 Vict. c. 54—*Rates* - - 933
See Poor-rate.

37 & 38 Vict. c. 68—*Scotland—Tramways* 58
See Scotch Law. 13.

37 & 38 Vict. c. 94, ss. 38, 39—*Conveyancing—Scotland* - - - - 582
See Scotch Law. 6.

38 Vict. c. 11—*Canada* - - - 159
See Canada, Law of. 5.

STATUTORY OBLIGATION—*Local Act—Persons incorporated—Powers and Duties—Negligence—Flowing Water.*] Where persons are incorporated by Act of Parliament for a particular purpose, and have full powers given them to effect that purpose, if the effecting of it may occasion (not only in the course of originally executing the necessary works for the required purpose, but at recurring intervals afterwards) inconvenience or injury to others, they may be treated as under an obligation to take, from time to time, measures to prevent the occurrence of such inconvenience and injury.—Where the Legislature has authorized certain persons to effect a certain purpose, and has given them the powers necessary to effect it, they may exercise those powers to their full extent without incurring responsibility, but in so doing they must not occasion any needless injury to any one.—A local Act of Parliament incorporated certain persons for the purpose of securing a regular and proper supply of water to millowners whose works were situated on the banks of the River *B.* These persons had powers given them to collect the waters of several small streams into a reservoir, and, as often as necessary, to send down those waters to the *B.* through the channel of a stream called *M.* The 2nd clause of the Act directed them to "make, erect, construct, maintain, repair, and keep," by means of a reservoir, a due and adequate supply of water for the River *B.* at all seasons of the year—and to enter on the lands of the different streams named—to do what was necessary for the conveyance and due regulation of the supply of such waters, and "to make, erect, alter, maintain, repair, widen, deepen, scour, cleanse, and keep proper and sufficient conduits,

STATUTORY OBLIGATION—*continued.*

aqueducts, channels and watercourses, drains, feeders, weirs, dams," &c. The 82nd clause gave similar directions, and ordered that the surplus water should be returned into the different streams from which it had been taken, and also made provisions for supplying with water the cattle depasturing in fields adjoining.—The persons incorporated under the Act erected the reservoir, collected the waters of the different streams, and sent them through the channel of the *M.* to supply the *B.*, but, after a time, neglected to cleanse the channel of the *M.*, so that at times it overflowed its banks and did damage to the lands of the adjoining proprietors:—*Held*, that under the words of the Act there was an obligation on the persons so incorporated to take care that the due execution of the works and operations intended by the Act, should not be injurious to the lands lying along the banks of the *M.*, and that the bed or channel of the *M.* must be cleansed and kept in a proper state for the flow and reflow of the water that had to pass through it. Geddis *v.* Proprietors of the Bann Reservoir
[H. L. (I.) 430

2. —— *Railway—Private and Public—Level Crossing over Turnpike Road—Gates—Reparation—Statutes* 5 & 6 *Will.* 4, *c.* 50, *s.* 71—2 & 3 *Vict. c.* 45, *s.* 1—5 & 6 *Vict. c.* 55, *ss.* 9, 12, 21—8 & 9 *Vict. c.* 33, *s.* 69.] A private railway, on private property, made and used exclusively for the proprietors' own purposes, and not for passenger traffic, is not subject to the regulations as to gates and persons in charge at level crossings imposed by the Railway Statutes; nor are the proprietors bound at common law to erect such gates.—A horse escaping by night from a field, by no fault of its owner, strayed along a turnpike road on to a private branch railway at a level crossing where there were no gates, or person in charge. The horse then proceeded down the branch to the junction with the main line, on which it was killed by a passing train:—*Held*, that the proprietors of the private line, who could not have made the railway across the road on a level except with the leave or sufferance of the road trustees, (who could have imposed any conditions they thought right,) were not liable in damages, there being no obligation on them under the Railway Statutes to fence with gates the railway where it crossed the high road. Matson *v.* Baird & Co. - - - H. L. (Sc.) 1082

STIPEND—Scotch minister—Teinds - 765
See Scotch Law. 12.

STOCK EXCHANGE—Rules of—Insolvent members - - - - - - 213
See Bankruptcy. 1.

SUBSTITUTED HEIRS—Succession duty - 505
See Succession Duty.

SUCCESSION DUTY ACT (16 & 17 *Vict. c.* 51)—*Entail—Substitute Heirs—Power of Appointment by Selection.*] The 2nd section of the *Succession Duty Act* (16 & 17 Vict. c. 51), distinguishes succession by "disposition" from succession by "devolution of law;" and the rate of duty is to be regulated by the proquinquity of the successor to the "predecessor." The "predecessor" may be determined by considering whether the succession is by "disposition" or by "devolution of law."—

SUCCESSION DUTY ACT—*continued.*
Substitute heirs of entail not called *nominatim*, nor coming under a descriptive designation as the head of a new *stirps*, will be held to take by *devolution of law*, and not by *disposition*, and the *predecessor* in the sense of the *Succession Duty Act* will be the last possessor.—Under two entails executed by his lineal ancestors, the Earl of *Zetland* succeeded his uncle as heir substitute to estates in *Scotland*:—*Held*, confirming the decision of seven Judges of the Courts below, that within the meaning of the statute 16 & 17 Vict. c. 51, the uncle was the "*predecessor*" of the Earl, and that therefore taking by "devolution of law" he was liable to duty at the rate of three per cent.—*Per* Lord *Hatherley*: The person named specifically and *nominatim* in the deed would take the property by virtue of the deed alone, but those who derive any title by operation of law would have to pay as claiming an interest which would be pointed out by the law alone.—*Per* Lord *Selborne*: *Devolution by law* takes place whenever the title is such that an heir takes under it by descent from an "ancestor" according to the rules of law applicable to the descent of heritable estates, and in all cases of descent the estate of the successor is immediately "derived" from the "ancestor" from whom the estate descends.—*Per* Lord *Hatherley*: The word "ancestor" used in the Act is properly assignable to the person who really preceded in the estate, although that person may not be the progenitor of the successor.—*Per* Lord *Hatherley*: In the case of appointment by selection, the real author from whom the beneficiary takes his succession is the person who has given such limited power of selection.—*Lord Saltoun's Case* (3 Macq. 659) discussed. Earl of Zetland *v.* Lord Advocate H. L. (Sc.) 505

SUPERIOR AND VASSAL—Scotch law - 1298
See Scotch Law. 7.

SYNDICATE—Promoters of company—Fiduciary relation - - - - 1218
See Company. 1.

TAXATION—Power of provincial Legislature 1090
See Canada, Law of. 6.

TEINDS - - - - - - 765
See Scotch Law. 12.

TESTAMENTARY PAPER—Incorporation with will - - - - - - 404
See Will.

TIDAL RIVER—Riparian owner—Scotch law
See Scotch Law. 5. [529

TOLL—Inequality—Railway traffic - 1029
See Railway. 2.

TRADE-MARK—*Name—Form of Decree.*] Where the first producer of an article of manufacture has identified with it a particular name, whether his own name or a name which is a word descriptive of the article itself, such name becomes a trade-mark, and cannot be adopted and employed by another person in advertising a similar article.—Such adoption and employment will be restrained by injunction.—*S.* made a sewing-machine, to which he gave his own name; it became known by that name. He afterwards took other persons into partnership with him for the sale of the

TRADE-MARK—*continued.*
machines known as the "*S.*" sewing-machines, and which were made in great variety, and with many modifications, but though not protected by patents, were established in public favour under that name. *W.* sold sewing-machines, and advertised, among others, "*S.*" sewing-machines, but used his own trade-mark on the machines, and expressly stated in his advertisements that the machines sold by him were manufactured by himself:—*Held*, that this, nevertheless, constituted a wrongful invasion of the property of *S.*, and that *W.* might be restrained by injunction.—Fraud is not necessary to be averred or proved in order to obtain protection for a trade-mark.—*S.* filed a bill, praying for an injunction against *W.* The Court below made a decree dismissing the bill with costs, prefacing such dismissal with words which declared that the affidavits filed by the Plaintiff, even if uncontradicted and unshaken by cross-examination, would not establish the Plaintiff's title to relief; but ordered such affidavits to be considered as read, so that the Plaintiff upon any appeal might not be prejudiced by the omission thereof; and that the Defendant had applied to the Court for liberty to adduce evidence in answer, but that the Court being of opinion that it was not necessary to consider such application, &c.:—*Held*, that this decree was irregular, as it appeared to express an opinion upon affidavits which did not seem to have been read, but were only to be considered as read, and the Court had not heard the evidence tendered by the Defendant.—The House, after declaring its judgment upon such parts of the case as were not in dispute as to the facts, directed the case to be remitted to the Court below, considering that there had been a *primâ facie* case established by the Plaintiffs so as to require an answer by way of evidence on the part of the Defendant.—*Per* Lord *Blackburn*: *Quære*, whether the same reasoning and the same rules are applicable to a trade-mark and to a name used in an advertisement.—*Per* Lord *Blackburn*: *Quære*, whether there is a property in a name, and whether, in a case like this, it is necessary to prove fraud in the person who without warrant adopts it. "Singer" Machine Manufacturers *v.* Wilson - H. L. (E.) 376

TRADE NAME - - - - 355
See Trade-mark.

TRAMWAY—*Scotland* - - - 58
See Scotch Law. 13.

TRUST—Statute of Limitations—Charge of annuity - - - - - 974
See Limitations, Statute of.

TRUSTEE—Settlement—Discretion—Scotch law - - - - - - 795
See Scotch Law. 1.

UNDERWRITERS—Two ships belonging to the same owner - - - - 279
See Insurance.

UNDUE PREFERENCE—Railway traffic - 1029
See Railway. 2.

VENDOR—Description of—"Proprietors"—Statute of Frauds - - - 1124
See Vendor and Purchaser.

VENDOR AND PURCHASER—*Contract—Statute of Frauds—Specific Performance.*] Several persons interested in a particular piece of land, authorized, by agreement among themselves, one of their number, *W.*, to dispose of it. The land was divided into lots and a plan of the lots made, and certain conditions, on which the land might be let or sold, were printed on the plan. *M.*, an intending purchaser, made inquiries of *W.* as to the sale of certain lots. *W.* expressly informed him that he must purchase subject to the conditions stated on the plan. One of these conditions required that a purchaser should execute a contract embodying the conditions. *M.* offered to purchase these lots at a price which he named. *W.* promised to lay his offer before "the proprietors" (without naming or describing them), and very shortly afterwards wrote to *M.* that he had done so, and (stating the conditions,) that the proprietors had accepted his offer; adding, that in reducing the price they had taken into consideration his intention of soon building on the land, an intention which of course they wished to encourage. *W.* added that he had instructed the solicitors to forward to *M.* the agreement for purchase. There was, in fact, nothing in the conditions which bound a purchaser to build, though there were provisions which assumed that he might do so, and which, in such a case, regulated the mode of proceeding. *M.* wrote back, in answer, that he could not be bound to build at any given time, or at all, that the subject had better be reconsidered, unless *W.* was prepared to leave him to do as he might think best. *W.* replied that the acceptance of the offer was without condition, and that *M.* was free to do what he might think best. *M.* afterwards declined to complete the purchase:—*Held*, that what had taken place by the correspondence constituted a complete contract between the parties; that under such circumstances the execution of a formal deed was not necessary; that reference to it in *W.'s* letter did not suspend or in any way affect the contract; and that *M.* was bound specifically to perform his contract of purchase:—*Held*, also, that the dealings between the parties sufficiently shewed the authority of *W.* to enter into the contract; and, farther, that the description of "the proprietors" for whom he acted was sufficient. Rossiter *v.* Miller - - H. L. (E.) 1124

VESTED INTERESTS—Endowed Schools Act [857, 872
See Endowed Schools Act. 1, 2.

VESTING—Period of—Will—Scotch Law 1287
See Scotch Law. 10.

VICTORIA, LAW OF—*Contracts obtained by Fraud voidable but not void.*] In an action by the Appellant against the Respondent for alleged breaches of certain covenants contained in their deed of partnership, and for fraud alleged to have been committed by the Defendant in obtaining a deed of dissolution thereof; it appeared that as regards the said breaches the Plaintiff had, by the deed of dissolution, in consideration of the Defendant having given up the whole of the partnership assets to the Plaintiff, released the Defendant from all matters and things whatever touching or concerning the joint trade, without prejudice nevertheless to the covenants and agreements in the said deed of dissolution contained:—*Held*, that as the release could not be separated from the rest of the deed of dissolution, and as the Plaintiff had not disaffirmed, and was not in a condition to disaffirm or rescind the contract, of which the release formed part, the same was binding upon him.—Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud, subject to the condition that the other party if the contract be disaffirmed, can be remitted to his former state.—*Clarke* v. *Dickson* (E. B. & E. 148) approved. Urquhart *v.* Macpherson - - P. C. 831

2. —— *Victorian Master in Equity—Probate Duty—Mandamus—Construction of Will—Vested Interest—Act No.* 388, *s.* 24.] The Supreme Court of *Victoria* has power to make an order of a mandatory character upon the Master in Equity in relation to duties claimed by him under Act No. 388, whether in his capacity of an officer of the Court or of a revenue officer responsible to the Crown.—*Reg.* v. *Lords of the Treasury* (Law Rep. 7 Q. B. 387) distinguished.—A testator directed the trustees of his will to hold a certain fund in trust "for my child (if only one), or for all my children (if more than one), in equal shares, and so that the interest of a son or sons shall be absolutely vested at the age of twenty-one years and of a daughter or daughters at that age or marriage:"—*Held*, that the shares of the children were on the death of the testator vested in interest though subject to be divested. "Vest" may, if the context of the will is in favour of that construction, be read as importing only that the interest previously vested is at a specified time to become absolute and indefeasible.—Where the whole beneficial interest in the testator's estate was under his will vested in his widow and children, with a limitation in favour of his grandchildren, the defeasible character of each child's interest only affecting the shares of the children or grandchildren *inter se*, with a gift over on the happening of a contingency, probate must be delivered on payment of duty at the rate of 5 per cent., notwithstanding that additional duty is payable on the gift over taking effect.—*Quære*, whether this would not also have been the case had the shares of the children not been vested in interest.—*Re Thomas Willsmore's Estate* (2 Vict. L. R. Insol. & Prob. Cas. 30) commented upon.—Sect. 24, Act. No. 388, is not to be construed strictly against those who invoke its benefit, because it establishes an exception to a general rule. Armytage *v.* Wilkinson - P. C. 355

WAREHOUSEMAN—Lien - - - 319
See Sale of Goods. 2.

WARRANTY—Seaworthiness - - 72
See Ship.

WASTE—*Injunction—Long Lease for Years.*] The grant of an injunction to restrain a person from doing a particular thing is an act dependent on the discretion of the Court, and in exercising that discretion a Court of Equity will consider, among other things, whether the doing of the thing sought to be restrained must produce an

WASTE—*continued.*

injury to the party seeking the injunction; whether that injury can be remedied or atoned for, and, if capable of being atoned for by damages, whether those damages must be sought in successive suits, or could be obtained once for all.—Two leases were granted of pieces of land with some buildings on them, one granted in 1798 for 999 years, the other granted in 1824 for 988 years. There was no reservation of a power of re-entry for breach of covenant, nor was there any negative covenant obliging the lessee not to change the use of the premises. There was a power of re-entry, for rent in arrear and no sufficient distress on the premises. In each lease there was a covenant by the lessee that he, his executors, &c., will "during the term hereby granted, preserve, uphold, support, maintain, and keep the said demised premises, and all improvements made and to be made thereon, in good and sufficient order, repair, and condition; and at the end or sooner determination of this demise, shall and will so leave and deliver up the same unto," the lessor, his heirs, &c. The premises had been used as corn stores for some years; and afterwards as artillery barracks, and dwellings for married soldiers. They had fallen into disrepair; it became necessary to repair them; the lessee thought it would be beneficial to convert the store buildings into dwelling-houses, which would much increase their value, and was proceeding to convert them accordingly, when the lessor filed a bill to restrain him, alleging waste:—*Held*, that this was not the case of enforcing a negative covenant where the words of contract were clear and indisputable; that the waste alleged was meliorating waste, and that, under the circumstances, the Court below had, in the due exercise of its discretion in such matters, properly refused to interfere by injunction. Doherty *v.* Allman **H. L. (I.) 709**

WATER—Overflow—Local Act—Negligence
See Statutory Obligation. 1. [430

WILL — *Additional Paper—Conversion of Real Estate — Residuary Legatee — Heir-at-Law — Costs.*] Where a will refers to a paper, such paper cannot be incorporated with the will, unless it is clearly identified with the description of it given in the will, and is shewn to have been in existence at the time the will was executed. Both these matters must be established, and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper with the will.—The onus of establishing these two matters lies on the person who seeks to make the paper admissible for such a purpose.—The term "residuary legatee" is not of an invariable nature, it must be fashioned and moulded by the context of the will.—A will began, "I direct my executors to pay the expenses of my funeral, and all my lawful debts, out of the proceeds of my property." It went on thus, "Whereas I am possessed of landed and chattel

WILL—*continued.*

property, as stated in the annexed schedule, I direct my executors to sell my landed property, namely" (and then four separate pieces of landed property were named), "for its full value." Several legacies were then given, and then a fifth landed property was specially devised to *I. W.*, a person fully described, with an ultimate remainder to *T. T.*, and then came the gift of other legacies, and finally the will declared, "I constitute the said *T. T.*," describing him, "my residuary legatee." The will was written on three sides of a sheet of paper, the signature and attestation were at the bottom of the third side, the schedule was on the fourth side; it was in the handwriting of the testator, was signed by him, and bore the same date as the will. It described the four portions of landed estate, and as to the fifth landed estate said, it "is not included in the above schedule, being willed by me to *I. W.*; my executors have no control over it." The witnesses who attested the will had not seen the schedule when they made their attestation:—*Held*, that, as this schedule was not proved to have been written at the time of the execution of the will, it could not be incorporated with the will nor referred to for the purpose of assisting in its construction:—But *Held*, also, that the will itself clearly directed the whole of the testator's real estate (except the portion specifically devised to a particular person) to be turned into money, so as to be converted out and out, not for a special purpose only, but for the general objects of his will, and that, after satisfying those objects, the surplus went to the residuary legatee, and not to the heir.—In a suit upon the construction of a will, the Court directed that the heir-at-law should be made a party. He was so. The Vice-Chancellor decided that he was entitled to the residue. The Court of Appeal reversed that decision. On appeal to this House, the order of the Court of Appeal was in substance affirmed. But under the circumstances of the case the heir-at-law was not treated as an ordinary Appellant in a case of construction of a will, but was ordered to be allowed his costs in the Court below and in the appeal.—Observations on words used in the order of the Court below. Singleton *v.* Tomlinson – **H. L. (I.) 404**

—— Annuity—Express trust – – **974**
See Limitations, Statute of.

—— Construction—Period of vesting—Scotch law – – – – – **1287**
See Scotch Law. 10.

—— Trustees—Discretion of—Scotch law **795**
See Scotch Law. 1.

—— Vesting—Law of *Victoria* – – **355**
See Victoria, Law of. 2.

WORDS—"Proprietors" – – – **1124**
See Vendor and Purchaser.

WRITTEN ORDER—Engineer's certificate **1040**
See Building Contract.

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